Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

OCEAN HARBOR HOUSE
HOMEOWNERS ASSOCIATION,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Dolan v. City of Tigard, 512 U.S. 374, 386 (1994), requires a connection between an exaction and the projected impact of the proposed development. There must be rough proportionality—"some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391.

Is *Dolan*'s "rough proportionality" requirement violated by a $5.3 million in-lieu fee, imposed in exchange for a permit to build a seawall that will cause the loss of one acre of public beach, when that fee (1) grossly exceeds the market value of one acre of beachfront property in the vicinity of the seawall; (2) is determined by a method expressly adopted to generate an arbitrarily predetermined amount of revenue; and (3) will be utilized not to replace the acre of beach that will be lost to the seawall, but to finance undetermined recreational opportunities to serve an undetermined population at an undetermined place and time?

LIST OF ALL PARTIES

Petitioner: Ocean Harbor House Homeowners Association

Respondent: California Coastal Commission

CORPORATE DISCLOSURE STATEMENT

Ocean Harbor House Homeowners Association is a California Limited Partnership formed to maintain a condominium complex in Monterey, California, and to govern the affairs of Ocean Harbor House Homeowners Association. Petitioner has no parent company and no stock.

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PETITION FOR WRIT OF CERTIORARI

Ocean Harbor House Homeowners Association respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Sixth Appellate District.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 163 Cal. App. 4th 215 (Cal. App. 6th Dist., 2008), and is reproduced as Appendix A to this petition. The unreported judgment of the superior court is reproduced as Appendix B. The California Supreme Court's unreported order denying review is reproduced at Appendix C.

JURISDICTION

The opinion of the California Supreme Court denying review in this matter was entered on August 13, 2008. Appendix C. This petition is timely under Supreme Court Rule 13. On October 30, 2008, Justice Kennedy granted Ocean Harbor House Homeowners Association's timely application to extend the time within which to file the petition to and including December 11, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This case demonstrates how far some courts have strayed from the purpose of the regulatory takings tests established in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and the need for this Court to provide guidelines for applying *Dolan*'s "rough proportionality" test.

Petitioner Ocean Harbor House Homeowners Association (hereafter, Petitioner or OHH) sought an application to build a seawall to protect the beachfront units of its condominium complex from being battered and damaged by the sea. The California Coastal Commission (CCC) granted the permit, but with a condition that Petitioner pay $5.3 million to mitigate for the loss of approximately one acre of public beach in front of the complex. (The CCC determined that the seawall would create passive erosion that would eventually result in the loss of the beach. App. at A-14.)

The CCC eschewed the obvious method for determining the value of an acre of land, the real estate valuation method recommended by CCC staff, and chose a method that would justify a much larger fee ($5.3 million versus $1 million to purchase an acre of beachfront property). The CCC viewed the loss not as a loss of property, but as a loss of recreational opportunities for the beach-going public. Because recreational use has no market price, the CCC needed a method to arrive at a $5.3 million fee. That method was what is called the "travel-cost method," which uses various expenditures to determine the difference between what a person is willing to pay to enjoy a beach and how much it actually costs to do so. The average per person cost of getting to the beach is used as a proxy for admission price. App. at A-39-40. The data used to calculate OHH's fee were based on economic studies evaluating the costs beachgoers would pay to enjoy beaches in southern California, hundreds of miles from Monterey. App. at A-40-43. The $5.3 million dollar fee will be used to provide unspecified recreational opportunities at an unspecified location. Administrative Record (AR) at 14:2512.

In *Nollan v. California Coastal Commission*, 483 U.S. 825, government regulation took the form of an exaction—the California Coastal Commission imposed a condition requiring the property owner to dedicate a strip of beach in order to obtain a permit to rebuild his house. *Id.* at 827-28. This Court held that there must be a close connection between the condition imposed on the use of land and the social evil that would otherwise be caused by the unregulated use of the owner's property. *Id.* at 837. Without such a connection, a permit condition is "not a valid regulation

of land use but 'an out-and-out plan of extortion.'" *Id.* (citations omitted).

Seven years later, in *Dolan v. City of Tigard*, 512 U.S. 374, this Court defined how close a "fit" is required between the burdens imposed by a development exaction and the burdens created by a proposed development plan. Where a nexus is found, there must also be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—"some sort of individualized determination that the required dedication is related *both in nature and extent* to the impact of the proposed development." *Id.* at 391 (emphasis added).

Together, these tests ensure that property owners are not subjected to extortionate conditions on development. *See Nollan*, 483 U.S. at 837; *also see Lambert v. City and County of San Francisco*, 529 U.S. 1045 (2000) (Scalia, Kennedy, and Thomas, J.J., dissenting from denial of certiorari) ("The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process 'an out-and-out plan of extortion.'") (citations omitted).

The court of appeal in this case endorsed the use of the economic recreational value method and the CCC's reliance on studies of other beaches to support its application to OHH. The court held that the resulting fee met the rough proportionality standard of *Dolan*. App. at A-43. The court did not analyze the "nature and extent" of the relationship between the exaction and the impact of the seawall. The result is that OHH must pay an exaction in an amount more than five times the estimated cost of purchasing other beachfront property in the area.

This result expands the universe of criteria meeting the rough proportionality test so far as to render the standard meaningless.

STATEMENT OF THE CASE

Petitioner OHH was formed to maintain a 172-unit condominium complex on Del Monte Beach in the City of Monterey. The complex is located at the seaward edge of a dune field and is bordered on the east by State Park lands, on the north by City of Monterey beach property, and on the west by City parklands. There is no dispute that the Ocean Harbor House complex will suffer significant damage from storm waves and shoreline erosion if action is not taken to protect the oceanfront portion of the structure. OHH sought a permit to construct a seawall to prevent the seaward units of the complex from collapsing into the sea. App. at A-13.

A. OHH's Application to Build a Seawall

The Monterey City Council certified OHH's seawall Environmental Impact Report (EIR) and a statement of overriding considerations, in which it found that the safety benefits of the seawall—to OHH as well as to beachgoers and city residents—outweigh the impact of the project. The City considered several alternatives, but determined that the seawall was the only feasible one. App. at A-14. The EIR identified two significant effects—the negative visual impact of the seawall, and loss of the beach width in front of the seawall—and concluded that those could not be fully mitigated, but could be "substantially lessen[ed] or reduce[d] to insignificance." *See id.* at A-13-14; AR

at 8:1631-32. The City imposed conditions for that purpose, including requirements that the seawall be designed to resemble a sand dune, and that OHH provide safe, year-round public access through the parking lot in the center of the complex to the beaches on either side of the OHH property. AR at 8:1636; 11:1793.

Because the City of Monterey does not have a fully certified Local Coastal Plan, OHH had to obtain a permit to build the seawall from the Coastal Commission. AR at 12:2053.

B. The CCC's Action

The CCC determined that OHH's seawall will ultimately lead to the loss of approximately one acre of public recreational beach land, including 435 linear feet of lateral beach access in front of the complex. App. at A-14; AR at 12:2052. The CCC staff was not satisfied with the conditions imposed by the City of Monterey because they did not mitigate for the "significant loss" of purported "recreational beach use." AR at 12:2071. The CCC's solution was to impose an in-lieu fee which would allow the CCC to purchase one acre of beachfront property somewhere else. AR at 12:2071-73.

Although the Commission's staff evaluated three different methods for calculating the mitigation fee, it recommended adopting the real estate valuation method, which estimated the value of the beach by reference to land values in the surrounding area. App. at A-15-16; 18-19. The staff recommended this method because it was "most closely tied to [the] specific land values in the vicinity of the project." AR at 4:742; App. at A-19. Pursuant to this valuation method, the staff

recommended an in-lieu fee of $1 million, based on an estimate of "the amount of money required to purchase and set aside from development approximately 1 acre of beach property somewhere else along the California coast." AR at 4:734.

At its October 14, 2004, hearing, however, the CCC decided that $1 million was not enough money. AR at 11:2022; 2032-33. *See* App. at A-20. The CCC voted to increase the mitigation fee to $5.3 million, and instructed staff to choose a valuation method that would result in a fee of that amount. *See* AR at 11:2022-2025. The CCC acknowledged that the economic beach valuation method, initially rejected as too imprecise, might be used to rationalize the higher amount: "[W]e have done an analysis of [alleged beach] loss [which] could be calculated based on this approach, which would get you to the $5 million." AR at 11:2024. (CCC staff later determined that the fee could be paid in five equal installments over five years. OHH would be required to pay a total of $2,150,054, which represents the present value of 50 yearly installments that would total $5.3 million. App. at A-21.)

C. The Trial Court's Decision

On January 28, 2005, OHH filed a Verified Petition for Writ of Administrative Mandate and Complaint for Inverse Condemnation and Injunctive Relief seeking to overturn the $5.3 million exaction. In relevant part, OHH argued that the exaction constituted a taking under the Fifth Amendment to the United States Constitution because the exaction is not sufficiently related to the impact of the seawall on public facilities. California law provides that monetary exactions are subject to the standards of *Nollan* and

Dolan. *Ehrlich v. City of Culver City*, 911 P.2d 429, 444, *cert. denied*, 519 U.S. 929 (1996).

The trial court denied the writ petition on September 5, 2006. App. at B-14. The trial court determined that the in-lieu fee had the requisite nexus with the impact of the seawall because the CCC "has a strong interest" in maintaining public access to beaches, and the fee would be "used to purchase and provide for shoreline recreational property." App. at B-11. The court held that the fee was roughly proportional to the impact because the CCC had concluded that "there [was] no meaningful way to directly mitigate the loss of this particular public beach," and thus the CCC had "sought to do so by acquiring other beach property within the area to replace this loss to the public. The Court finds the plan to be an acceptable and practical designed mitigation." *Id*. at B-13.

The trial court refused to analyze the method by which the fee was calculated, ruling that OHH had not raised the issue before the CCC. Thus, the court determined that OHH's objections based on the "nexus" and "rough proportionality" of the in-lieu fee were insufficient to satisfy the administrative exhaustion requirement. App. at B-9-10.

D. The Court of Appeal's Decision

The Sixth District Court of Appeal affirmed the lower court's decision in a published opinion. But the Court of Appeal did review the method by which the fee was calculated. App. at A-38 n.7. The Court noted that OHH had not forfeited its general claim that the fee lacks a nexus and rough proportionality to the alleged impact, and explained that it could not

determine whether the fee is roughly proportional to the impact of the seawall without "evaluat[ing] both the nature of the impact and the way its dollar value was measured." *Id.* at A-38.

As for the nexus requirement, the court held that "a fee to purchase beach for public recreation [anywhere] has a logical tendency to mitigate loss of recreational use on the beach at the complex." *Id.* at A-36. The court found rough proportionality by endorsing the economic recreational value method used by the CCC. *Id.* at A-43-44. The court explained that, "because recreational use is not a commodity with a market price to reflect its value, certain types of expenditures must be used as a proxy in determining recreational value." *Id* at A-37. The court reviewed the various economic studies of beaches in Southern California upon which the CCC based its calculations and from which the CCC extrapolated a mitigation fee for the loss of the beach fronting the OHH complex. *Id.* at A-40-43. The court concluded that "the economic studies establish the travel-cost method as a valid and accepted way to quantify recreational value and thus put a dollar value on the loss of recreational use." *Id.* at A-44.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD RESOLVE THE CONFUSION REGARDING HOW TO APPLY THE "ROUGH PROPORTIONALITY" STANDARD OF *DOLAN V. CITY OF TIGARD*

The nexus and rough proportionality tests of *Nollan* and *Dolan* have been the law regarding individually imposed exactions for many years. The viability of this takings test was recently affirmed in the context of development exactions generally. In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005), this Court listed the regulatory takings tests which are valid under current law. The Court "reaffirm[ed] that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . by alleging . . . a land-use exaction violating the standards set forth in *Nollan* and *Dolan*." *Id.* The Court's clarification of the viable takings theories was helpful. But as one commentator wrote in response to the *Lingle* decision, "beneath a facade of tidiness, the Court's takings jurisprudence remains downright incoherent. As my law school mentor put it a long time ago, 'to make a superb inventory of Augean stables is not to cleanse them!'"[1] Steven J. Eagle, *Recent Developments in Condemnation Law*, 38 Urb. Law. 1223, 1223-24 (2006).

Since *Dolan* was decided in 1994, this Court has provided no direction for applying the nebulous concept

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[1] In Greek mythology, the Augean stables housed a great number of cattle belonging to King Augeas. The stables had not been cleaned for many years. One of the twelve labors performed by Hercules was the cleaning of the Augean stables in a single day.

of rough proportionality when seeking to determine whether an exaction and the public harm are sufficiently related so as to pass muster under takings law. The lower courts have been left to apply the concepts as best they can. *See* Richard Duane Faus, *Exactions, Impact Fees, and Dedications—Local Government Responses to* Nollan/Dolan *Takings Law Issues*, 29 Stetson L. Rev. 675, 680 (2000):

> The local government is . . . required to show, by using some level of quantification, both in nature and extent, that the required exaction is roughly proportional to the impact of the proposed development. Evidenced by the legal and practical history of these tests, stating them is easy, applying them, through the development of evidence and findings in real world situations, is more difficult.

Malcolm M. Murray, *Life After* Dolan*: Will it Ever be the Same?*, 24 Colo. Law. 59, 60 (1995):

> The Court emphasized on two occasions in the [*Dolan*] opinion that no precise mathematical calculation is required, but that some effort must be made to quantify the impacts and relate them to the quantified demands generated by the development. What this really means will have to be fleshed out in future decisions.

(footnote omitted).

The result of this uncertainty is that many courts will accept almost any relationship as sufficient to meet *Dolan*'s "rough proportionality" requirement.

In *Dolan*, the City of Tigard required that Florence Dolan dedicate a portion of her property to

the City as a condition of a permit to replace her existing plumbing supply store with a new, expanded store. The City required that Mrs. Dolan dedicate a greenway easement to the City for improvements to a storm drainage system along Fanno Creek, and that she dedicate a 15-foot wide strip of land (amounting to about 10% of the parcel) for a pedestrian/bicycle pathway. *Dolan*, 512 U.S. at 381. The greenway easement was required to mitigate the increased storm water flow into Fanno Creek resulting from increasing the amount of impervious surface near the creek. *See id.* at 388, 392-93. The easement for a bicycle path was imposed so that there would not be a break in the planned continuous pathway called for in the City's Parks Master Plan and the Tigard Area Comprehensive Pedestrian/Bicycle Pathway Plan. *See id.* at 395 n.10.

The City claimed that the required easements were reasonably related to the impact of the expansion of Mrs. Dolan's store. *Id.* at 381-83. But this Court noted that Mrs. Dolan was already required to leave 15% of her parcel as open space, and the "city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control." *Id.* at 393. "It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek . . . ." *Id.* Similarly, the City did not demonstrate that the additional number of vehicle and bicycle trips generated as a result of the expansion of the store necessitated a pedestrian/bicycle easement. *Id.* at 395. The City simply said that it thought there would be some increase. *Id.* at 395-96.

This Court reviewed the range of standards adopted in various jurisdictions (*id.* at 389-90), and settled on the "'reasonable relationship' test adopted by a majority of the state courts" *(id.* at 391). The standard was termed "rough proportionality" to avoid confusing the standard with the rational basis standard. *Id.* This Court described three attributes of the new test: (1) mathematical precision is not required; (2) some kind of individualized determination is required; and (3) the dedication must be related both in nature and extent to the impact of the proposed development. *Id.* The third part of the test, although often cited in decisions, is rarely the subject of analysis when courts are asked to decide whether the rough proportionality test is met.

The instant case provides an example. The CCC eschewed the traditional method of determining the value of an acre of land—the real estate valuation method—for a method that attempts to calculate a dollar figure representing the lost recreational value of the beach. As the court of appeal explained, "the recreational value of a beach is viewed as the difference between what a person is willing to pay to enjoy it and how much it actually costs to do so." App. at A-39. The difference is called the consumer surplus, and that consumer surplus is estimated using the travel-cost method. *Id.* The travel-cost method uses the average per-person cost of getting to the beach as a proxy for an admission price. App. at A-39-40.

The court reviewed various economic studies of beaches in southern California upon which the CCC based its evaluations and from which the CCC extrapolated a mitigation fee for the loss of the beach in front of the OHH complex. App. at A-40-43. Neither

the CCC nor the court of appeal expressed reservations about using results from studies of distant and dissimilar beaches in the heavily populated southern California region to draw conclusions about beaches in the Monterey Bay area. Nor did either claim that the beaches and the travel costs in southern California are comparable to those in Monterey. The court concluded that "the economic studies establish the travel-cost method as a valid and accepted way to quantify recreational value and thus put a dollar value on the loss of recreational use." App. at A-44.

The court of appeal ultimately found that the $5.3 million mitigation fee satisfied the rough proportionality standard of *Dolan*. App. at A-43. The court referenced *Dolan* and even mentioned that the case provides no examples of what would satisfy the rough proportionality standard. *Id.* Earlier in its opinion, the court explained that it "must look behind the [CCC's] arithmetic and evaluate how the Commission analyzed the loss and measured it." App. at A-38. Although it is not altogether clear, the court of appeal seemed to say that it had reached the correct result because the CCC sufficiently justified its methodology in calculating the mitigation fee. *See* App. at A-43-44.

Entirely missing from the lower court's opinion is an analysis of whether the mitigation fee is sufficiently related in nature and extent to the loss of one acre of public beach. But the "nature and extent" elements of *Dolan* are essential to a proper analysis of the rough proportionality standard.

Some courts have attempted to devise a uniform method for analyzing the facts of cases to see if rough proportionality is present. Perhaps the best effort, in

terms ease of application, is that of the Supreme Court of Utah in a very recent decision in *B.A.M. Development, L.L.C., v. Salt Lake County*, ___ P.3d ___, 2008 WL 4682267 (Utah, Oct. 24, 2008). The high court of Utah was asked to decide whether the trial court had correctly applied *Dolan*'s rough proportionality standard to a requirement that a developer expand the width of a major road bordering its proposed development. The Utah court opined that this Court "has engendered vast confusion about just what the municipalities and courts are expected to evaluate when extracting action or value from a land owner trying to improve real property." *Id.* at *2. And the Utah court decided that this Court did not really mean rough proportionality; rather it meant roughly equivalent. *Id.* The Utah court then set out a relatively straightforward method of analysis.

First, to determine whether the nature of the exaction and the impact are related: (a) view the exaction as a solution and the impact as a problem; and (b) determine whether the exaction (solution) addresses the impact (problem). Second, to determine whether the exaction and the impact are related in extent: (a) the exaction and the impact should be measured in the same manner, or using the same standard; (b) determine the cost of the exaction to the developer and the cost of the impact to the municipality; and (c) determine whether the costs are roughly equivalent. *Id.*

> The trial court must determine whether the costs to each party are roughly equivalent. Because each factor is measured the same way, in dollars, this calculation should be

> very simple. If the two sums are about the same, they are roughly equivalent.
>
> *Id.* at *3.[2]

Applying the *B.A.M. Development* factors to the case before this Court exposes the flaws of the generalized assumption of rough proportionality and the benefits of a standard that includes an analysis of the nature and extent factors of *Dolan*. In this case, the payment of a $5.3 million dollar fee is the proposed solution intended to compensate for the loss of recreational use of one acre of public beach. The fee will be used to provide unspecified recreational opportunities at an unspecified location. If no satisfactory location is found, the money will go to "one or more of the State Parks located along southern Monterey Bay," or some organization acceptable to the Executive Director. AR at 14:2512. Given that the CCC found there was no beachfront property available for sale in the area, the replacement recreational uses

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[2] The Utah Supreme Court compiled its test based, in part, on two Washington state cases. *See Burton v. Clark County*, 958 P.2d 343, 352-55 (Wash. Ct. App. 1998), *review denied*, 978 P.2d 1097 (1999) (The court established four propositions which must be found to meet the *Nollan* and *Dolan* standards.). *Also see Sparks v. Douglas County*, 904 P.2d 738, 742 (Wash. 1995) (An exaction must be "reasonably calculated to prevent, or compensate for, adverse public impacts of the proposed development.") (citation omitted). For an in-depth analysis of the *Burton* test, *see* Richard Duane Faus, *Exactions, Impact Fees, and Dedications—Local Government Responses to* Nollan/Dolan *Takings Law Issues*, 29 Stetson L. Rev. at 680-84. Faus concludes that "*Burton*'s 'four propositions' structure provides a good basis for analyzing and producing findings to apply *Nollan/Dolan* in terms that can be taught to nonlawyers." *Id.* at 684.

may not be enjoyed on beachfront property or on property anywhere near the one acre of beach lost as a result of the seawall. Whether these facts are sufficient to demonstrate that the exaction and the impact are sufficiently related in nature is not entirely clear. But this test forces a court to examine the facts of the case and the relationship of those facts to each other in ways that generalized notions of rough proportionality do not.

Clearer in this case is the answer to the second requirement of the *B.A.M. Development* test—whether the exaction and the impact are related in extent. Here, it is not possible to use the same standard to measure the exaction and the impact. The exaction can certainly be expressed in a dollar amount, but as the court of appeal explained, recreational use is not a commodity with a market price to reflect its value. App. at A-37. It must be noted that if the CCC had demanded a fee to purchase one acre of beachfront property upon which the public could recreate, the exaction and the impact (the loss of one acre of beachfront property) could be measured in the same manner, using the same standard. But, because the costs would not be roughly equivalent, the exaction and the impact would not be sufficiently related in extent. The $5.3 million dollar exaction based on travel costs to beaches in southern California is in no way equivalent to the CCC's estimated cost of $1 million to purchase one acre of beachfront property in the Monterey Bay area.

The *B.A.M. Development* test provides a workable framework for analyzing *Dolan* rough proportionality questions. This test, or any test, would be immensely helpful to all of those involved in exactions

cases—property rights attorneys, property owners, and government entities.

Before *Dolan*, lower courts routinely found that the essential nexus test was satisfied. *Dolan* was adopted to prevent the complete nullification of *Nollan*. And now, cases such as this one demonstrate the extremes to which the lower courts will go to justify remote and extortionate exactions under *Dolan*. This result was a predictable and essential part of the evolution of the law. As explained by Professor Richard Epstein,

> One of the reasons for *Dolan* was the hostile response in the lower courts to *Nollan*. Everywhere you looked the state satisfied the essential nexus test. The lower courts worked a pretty thorough nullification of *Nollan*, which was dutifully confined to its particular facts. We don't know whether the same fate awaits *Dolan*. But the legal uncertainty creates all sorts of opportunities for speculation not only for law professors but also everyone who works in an area that is at the same time dynamic, confusing, and frustrating.

Richard A. Epstein, *Introduction; The Harms and Benefits of* Nollan *and* Dolan, 15 N. Ill. U.L. Rev. 477, 492 (1995).

It is time for direction that can come only from this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: December, 2008.

Respectfully submitted,

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Appendix A–1

Ocean Harbor House Homeowners Ass'n v. California Coastal Com'n

Cal. App. 6 Dist.,2008.

Court of Appeal, Sixth District, California.

OCEAN HARBOR HOUSE
HOMEOWNERS ASSOCIATION,
Plaintiff and Appellant,

v.

CALIFORNIA COASTAL COMMISSION,
Defendant and Respondent.

No. H031129.

May 23, 2008.

Review Denied Aug. 13, 2008.

Background: Condominium homeowners' association filed petition for writ of administrative mandate, challenging $5.3 million mitigation fee imposed by the Coastal Commission as a condition of permit to build seawall. The Superior Court, Monterey County, No. M73109, Robert A. O'Farrell, J., denied the writ. Association appealed.

Holdings: The Court of Appeal, Rushing, P. J., held that:

(1) nexus existed between loss of recreational resources arising from construction of seawall and mitigation fee to develop substitute recreational opportunities;

(2) mitigation fee of $5.3 million was roughly proportional to the loss of recreational use;

(3) lack of a specific study of the beach at issue did not render the fee unsupported by substantial evidence;

(4) Commission was not required to demonstrate that the fee strictly corresponded to recreational value of specific acre of beach; and

(5) Commission was not statutorily prohibited from considering the mitigation of impacts other than sand supply.

Affirmed.

West Headnotes

[1] Zoning and Planning 414 605

414 Zoning and Planning

414X Judicial Review or Relief

414X(C) Scope of Review

414X(C)1 In General

414k605 k. Decisions of Boards or Officers in General. Most Cited Cases

Zoning and Planning 414 621

414 Zoning and Planning

414X Judicial Review or Relief

414X(C) Scope of Review

414X(C)1 In General

414k619 Matters of Discretion

414k621 k. Decisions of Boards or Officers in General. Most Cited Cases

Zoning and Planning 414 625

414 Zoning and Planning

414X Judicial Review or Relief

414X(C) Scope of Review

414X(C)1 In General

414k625 k. Harmless Error. Most Cited Cases

The inquiry on judicial review of any decision or action of the California Coastal Commission shall extend to the questions of whether the Commission has proceeded without, or in excess of jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion. West's Ann. Cal. Pub. Res. Code § 30801.

[2] Administrative Law and Procedure 15A 749

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(D) Scope of Review in General

15Ak749 k. Presumptions. Most Cited Cases

Administrative Law and Procedure 15A 750

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(D) Scope of Review in General

15Ak750 k. Burden of Showing Error. Most Cited Cases

A trial court presumes that an agency's decision is supported by substantial evidence, and the party challenging that decision bears the burden of demonstrating the contrary.

[3] Administrative Law and Procedure 15A 791

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak784 Fact Questions

15Ak791 k. Substantial Evidence. Most Cited Cases

In reviewing an agency's decision for substantial evidence, a court examines the whole record and considers all relevant evidence, including that evidence which detracts from its decision.

[4] Administrative Law and Procedure 15A 790

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak784 Fact Questions

15Ak790 k. Rational Basis for Conclusions. Most Cited Cases

Administrative Law and Procedure 15A 793

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak784 Fact Questions

15Ak793 k. Weight of Evidence. Most Cited Cases

Although review of an agency's decision involves some weighing to fairly estimate the worth of the evidence, that limited weighing does not constitute independent review in which the court substitutes its own findings and inferences for that of the agency; rather, it is for the agency to weigh the preponderance of conflicting evidence, as the court may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it.

[5] Eminent Domain 148 122

148 Eminent Domain

148II Compensation

148II(C) Measure and Amount

148k122 k. Necessity of Just or Full Compensation or Indemnity. Most Cited Cases

The state and federal Constitutions prohibit government from taking private property for public use without just compensation. U.S.C.A. Const. Amend. 5; West's Ann. Cal. Const. Art. 1, § 19.

[6] Eminent Domain 148 2.10(1)

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.10 Zoning, Planning, or Land Use; Building Codes

148k2.10(1) k. In General. Most Cited Cases

A land-use regulation constitutes a taking that requires compensation if it does not substantially advance legitimate state interests or denies an owner economically viable use of his land. U.S.C.A. Const. Amend. 5; West's Ann. Cal. Const. Art. 1, § 19.

[7] Eminent Domain 148 2.10(7)

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.10 Zoning, Planning, or Land Use; Building Codes

148k2.10(7) k. Exactions and Conditions. Most Cited Cases

Nexus existed between loss of recreational resources arising from condominium homeowners' association's construction of proposed seawall and mitigation fee to develop substitute recreational opportunities elsewhere, in support of a finding that Coastal Commission's imposition of the mitigation fee, as a condition on permit to build the seawall, was not an unconstitutional taking; causal connection between seawall and loss of recreational use was direct and specific, and fee to purchase beach for public recreation had a logical tendency to mitigate loss of recreational use of the beach. U.S.C.A. Const. Amend. 5; West's Ann. Cal. Const. Art. 1, § 19.

[8] Eminent Domain 148 2.10(7)

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.10 Zoning, Planning, or Land Use; Building Codes

148k2.10(7) k. Exactions and Conditions. Most Cited Cases

Mitigation fee of $5.3 million was roughly proportional to the loss of recreational use of beach arising from condominium homeowners' association's construction of proposed seawall, in support of a finding that Coastal Commission's imposition of the mitigation fee, as a condition on permit to build the seawall, was not an unconstitutional taking, where the Commission based the fee on per person beach expenditures of beach users, as a quantification of recreational value of the beach. U.S.C.A. Const. Amend. 5; West's Ann. Cal. Const. Art. 1, § 19.

See 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 1156; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 818; Cal. Jur. 3d, Zoning And Other Land Controls, § 270; 11 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 30:30.

[9] Eminent Domain 148 2.10(7)

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.10 Zoning, Planning, or Land Use; Building Codes

148k2.10(7) k. Exactions and Conditions. Most Cited Cases

In homeowners' association's challenge to mitigation fee on which permit to build seawall was conditioned, the lack of a specific study of recreational value of the beach at issue did not render Coastal Commission's imposition of $5.3 million fee unsupported by substantial evidence, as would support association's claim that the fee was an unconstitutional taking; Commission acknowledged the lack of a study and relied on other studies, adopting the benefit transfer approach to estimate the recreational value of the beach at issue, and homeowners did not establish that differences in level of development or climate and temperature made use of the benefit transfer data unreasonable. U.S.C.A. Const. Amend. 5; West's Ann. Cal. Const. Art. 1, § 19.

[10] Eminent Domain 148 2.10(7)

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.10 Zoning, Planning, or Land Use; Building Codes

148k2.10(7) k. Exactions and Conditions. Most Cited Cases

Coastal Commission was not required to demonstrate that mitigation fee, upon which permit to build seawall was conditioned, strictly corresponded to the

recreational value of specific acre of beach that would be lost due to the seawall, in order to demonstrate that the mitigation fee roughly corresponded to the recreational value of the beach, in homeowners' association's action challenging the fee as an unconstitutional taking, where Commission used the average number of annual visitors to an acre of beach. U.S.C.A. Const. Amend. 5; West's Ann. Cal. Const. Art. 1, § 19.

[11] Zoning and Planning 414 384.1

414 Zoning and Planning

414VIII Permits, Certificates and Approvals

414VIII(A) In General

414k384 Nature of Particular Structures or Uses

414k384.1 k. In General. Most Cited Cases

Coastal resource planning statute allowing seawalls to be built when designed to mitigate impact on local shoreline sand supply, did not prohibit Coastal Commission from considering the mitigation of impacts other than sand supply when placing conditions on seawall permits; the statute was permissive and did not preempt other sections of the Coastal Act requiring the Commission to consider other factors in granting coastal development permits. West's Ann. Cal. Pub. Res. Code § 30235.

[12] Zoning and Planning 414 572

414 Zoning and Planning

414X Judicial Review or Relief

414X(A) In General

414k572 k. Preservation Before Board or Officer of Grounds of Review. Most Cited Cases

In homeowners' association's challenge to mitigation fee on which Coastal Commission conditioned permit to build seawall, association preserved for judicial review its claim that, under coastal resource planning statute allowing seawalls to be built, the Commission lacked authority to impose conditions other than to mitigate the impact on local sand supply, where association's attorney, in a letter to the Commission, asserted that the association was being required to mitigate sand loss, provide alternative lateral access, and to comply with other mitigation measures that were typically imposed on applicants. West's Ann. Cal. Pub. Res. Code § 30235.

[13] Statutes 361 195

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k195 k. Express Mention and Implied Exclusion. Most Cited Cases

The rule of statutory interpretation that the expression of one thing implies the exclusion of others does not apply where its application would run counter to a well established principal of law, or where the operation of the rule would contradict a discernible and contrary legislative intent.

[14] Zoning and Planning 414 2

414 Zoning and Planning

414I In General

414k2 k. Purpose. Most Cited Cases

The Coastal Act was enacted as a comprehensive scheme to govern land use planning for the entire coastal zone of California; its broad goals are protection of the coastline and its resources and maximization of public access. West's Ann. Cal. Pub. Res. Code § 30000 et seq.

[15] Zoning and Planning 414 572

414 Zoning and Planning

414X Judicial Review or Relief

414X(A) In General

414k572 k. Preservation Before Board or Officer of Grounds of Review. Most Cited Cases

Zoning and Planning 414 581

414 Zoning and Planning

414X Judicial Review or Relief

414X(B) Proceedings

414k581 k. In General. Most Cited Cases

In homeowners' association's challenge to mitigation fee on which Coastal Commission conditioned permit to build seawall, association forfeited for judicial review its claim that because certain buildings would be lost without a seawall, denying a permit would constitute a taking and that imposition of a mitigation fee thus constituted a taking, where association did not

make the claim to the Commission, and did not raise it in its opening brief.

****435** Pacific Legal Foundation, Meriem L. Hubbard, Timothy Sandefur, Sacramento, Attorneys for Plaintiff and Appellant Ocean Harbor House Homeowners Association.

Edmund G. Brown, Jr., Attorney General, J. Matthew Rodriguez, Senior Assistant Attorney General, Joseph Barbieri, Supervising Deputy Attorney General, Christiana Tiedemann, Deputy Attorney General, Attorneys for Defendant and Respondent California Coastal Commission.

RUSHING, P. J.

***219 STATEMENT OF THE CASE**

Plaintiff Ocean Harbor House Homeowners Association (Homeowners) sought a costal development permit from defendant California Coastal Commission (the Commission) to build a seawall to protect their condominium complex from erosion that threatened its structural integrity. The Commission granted the permit but as a condition required Homeowners to pay a fee to mitigate the loss of an acre of beach, the fee to be used toward the purchase of beach property elsewhere. Homeowners challenged the fee by ***220** petition for a writ of administrative mandate (Code of Civ. Proc., § 1094.5), but the trial court denied the writ. Homeowners now appeal from the judgment. They claim that (1) the fee is an unconstitutional taking because there is no nexus or rough proportionality between it and the projected impact of the seawall; (2) the Commission lacked statutory authority to impose the fee; (3) the fee is not supported by substantial

evidence; and (4) the Commission arbitrarily increased the amount of the fee.

We find no merit to these claims and affirm the judgment.

THE ADMINISTRATIVE PROCEEDINGS

Ocean Harbor House is a 172-unit, multi-building condominium complex on Del Monte Beach fronting Monterey Bay in the City of Monterey (the City). It was built in the late 1960's and mid-1970's; and since the mid-1980's, the seaward buildings have been threatened by storms, high water level, and shoreline erosion. Homeowners tried various measures to prevent erosion and destabilization, but the measure proved to be inadequate. Finally, ****436** to secure more permanent protection, Homeowners applied to the City and the Commission for permits to build a 585-foot seawall.

The Monterey Planning Division prepared an environmental impact report (EIR). It stated that water hitting the seawall would contribute to a "[p]eninsula [e]ffect," which meant that the beach on each side of the complex would slowly erode and the complex would be left protruding out from the shore. The EIR concluded that the erosion due to the seawall would cause "a substantial negative aesthetic impact to, or 'sense of loss' of the existing visual character of the site and its surroundings," visually break the continuity of a two-mile stretch of beach, prevent visitors from walking its entire length, and reduce recreational use.

After considering alternatives to a seawall and different types of mitigation, the EIR concluded that there was no feasible way to mitigate "[p]eninsula

[e]ffect" or the visual impact of the seawall. However, the loss of continuous lateral access could be mitigated if the Homeowners provided alternative access through the parking lot behind the complex. The EIR considered that loss of recreational use to be insignificant because large stretches of beach would remain.

The City granted a permit but required that Homeowners provide alternate lateral access and design the seawall to resemble the natural landscape.

After obtaining the City's approval, Homeowners turned to the Commission. A report by Commission staff concluded that there was no feasible alternative ***221** to a seawall that could both protect the complex and remain consistent with the Coastal Act (Public Resources Code, sections 30000 et seq. (the Act)), which allows seawalls if necessary to protect existing structures. (Pub.Res.Code, § 30235.)FN1 Accordingly, the report recommended granting the permit with conditions.

> FN1. All unspecified statutory references are to the Public Resources Code.

The report noted that the seawall would ultimately cause an acre of beach to erode with an attendant loss of lateral access along the beach and recreational use. The loss of lateral access could be partially mitigated by requiring access through the complex's parking lot, but it would not be "qualitatively equivalent" to continuous access along the beach. On the other hand, there was no feasible way to mitigate the loss of beach at the site. The existing beach could not be maintained, new beach could not be created, and there was no new potential public recreational land in the

area to mitigate the loss at the site. However, the report opined that without mitigation for this impact, the project could not be deemed consistent with the Act, which required the Commission "to protect maximum public access and recreation to and along the shoreline." Consequently, the report recommended an in-lieu mitigation fee to be used to buy beach property in the southern Monterey Bay area for public recreational use. The report also recommended a number of other conditions, including lateral access through the complex's parking lot, as required by the City.

The report discussed three methods to determine the value of the acre of beach that would be lost and thus the amount of the mitigation fee. Each method considered the loss of beach from a different perspective. One method-the sand-replacement method-based the fee on the cost of buying enough sand to cover an acre of beach, which, based on the market price of sand, was somewhere between $1,031,400 and $1,206,900. The report noted **437 that this approach addressed the loss of sand but not the value of public access and recreational use that would also be lost. Moreover, this method underestimated the loss because "[t]o retain the beach in front of the [complex], this mitigation would have to be repeated numerous times over the 50-year life of the project because high tides and storm-surge wave run-up would regularly remove this sand from the beach."

The second method—the real-estate-value method—based the fee on the price of a comparable acre of beachfront property. According to the report, this method "directly reflects land values, which is the

impact in question, and is based on resources in the vicinity of the project." The report noted that the price would vary depending on the property's location and "developability." However, using data on sales in the Monterey area, the report estimated that it would cost $1 million to purchase an acre in the area.

*222 The third method—the economic recreational value method—based the fee on the recreational value of the acre of beach. The report cited numerous economic studies and analytical guides on how to quantify the value of recreational use using certain types of expenditures by visitors as a reflection of value. FN2 Based on data in certain studies, the report concluded that a reasonable, if not conservative, estimate of the recreational value of the Monterey beach was $13 per person per visit. Using that figure and state park data showing 968,287 annual visitors, the report calculated the recreational value of the entire 60.6-acre beach and then the average value per acre. The report then pointed out that it would take 50 years for the acre at the complex to erode, which meant that only 870 square feet would be lost each year. Accordingly, the report determined the recreational value of 870 square feet that would be lost per year and the cumulative recreational value that would be lost over 50 years. The result was $5.3 million in recreational value. The report further explained, however, that such a fee would have to be discounted to present value if it **438 were paid in one lump sum instead of installments over 50 years. FN3

FN2. Among the studies and guides that were cited in the report and/or submitted in support of it and included in the administrative record are: Leeworthy,

Schruefer, and Wiley (1990) *A Socioeconomic Profile of Recreationists at public Outdoor Recreation Sites in Coastal Areas: Volume 5*; Leeworthy, Schruefer, and Wiley (1990) *Expenditure Profiles of Visitors to Southern California Coastal Areas*; Leeworthy, Schruefer, and Wiley (1991) *A Socioeconomic Profile of Recreationists at Public Outdoor Recreation Sites in Coastal Areas: Volume 6*; Arrow, Solow, Portney, Leamer, Radner, and Schuman (1993) *Report of the NOAA Panel on Contingent Valuation*; Leeworthy and Wiley (1993) *Recreational Use Value for Three Southern California Beaches* (hereafter Leeworthy and Wiley (1993)); King and Potepan (1997) *The Economic Value of California Beaches*; Ulibarri and Wellman (1997) *Natural Resource Valuation: A Primer on Concepts and Techniques*; King (1999) *The Fiscal Impact of Beaches in California*; EPA *Guidelines for Preparing Economic Analyses* (hereafter, EPA *Guidelines*); Chapman and Hanemann (2001) *Environmental Damages in Court: The American Trader case* (hereafter, *American Trader* study); Pendleton (2004) *Harnessing Ocean Observing Technologies to Improve Beach Management: Examining the Potential Economic Benefits of an Improvement in the Southern California Coastal Ocean Observing System*; King [undated] *The Potential Loss in Gross National Product and Gross State Product from a Failure to Maintain California Beaches* <http://online.sfsu.edu/pgking/carpenteria. pfd> (as of May 22, 2008);

National Oceanic and Atmospheric Administration . (NOAA) (1995) *Economic Valuation of Natural Resources*; NOAA publication *Beach Nourishment: A Guide for Local Government Officials*; King [undated] *Economic Analysis of Beach Spending and the Recreational Benefits of Beaches in the City of San Clemente; Ecosystem Valuation "Dollar-based Ecosystem Valuation Methods"* <http://www.ecosystemvaluation.org> (as of May 22, 2008).

FN3. The calculations in the report are as follows: 60.6 acres of beach divided by 968,287 annual visitors equals 15,978 visitors per acre; 15,978 annual visitors times a recreational value of $13 per person equals an annual recreational value of $207,714 per acre. The yearly amount of erosion-870 square feet-represents 0.019972 percent of an acre. That percentage of the total annual recreational value of an acre ($207,714) equals $4,148.

Thus, $4,148 in recreational value would be lost the first year; in the second year, the loss would be the original $4,148 plus another $4,148 for the next 870 square feet lost; and, "[e]ach successive year would add another $4,148 to the total from the previous year's total because the project will need to mitigate for the cumulative beach loss over time."

***223** The report opined that the recreational value method was" attractive because it is based on an analysis of actual beach recreational values in the vicinity of the project." However, this method also

"requires assumptions" about the economic value that beach goers place on the beach. Nonetheless, the report opined that its calculation "is likely conservative (underestimates) because it does not account for the value of non-quantifiable benefits of the recreational beach resource. Nor does it include other benefits such as potential habitat and aesthetic values."

The report ultimately recommended a $1 million mitigation fee based on the land-replacement method, finding it "closely tied to specific land values in the vicinity of the . . . seawall on public recreational beach land." However, the report opined that "this fee must be considered only partial mitigation for the impacts of the proposed project, since no measure can prevent the loss of the existing recreational beach currently fronting [the complex]." It further opined that analysis under the economic valuation methods suggested that the recommended fee is conservative and underestimates the loss due to the seawall.

The Commission report was circulated to interested parties, and before the hearing, Homeowners submitted a written response through their attorney David Larsen. He claimed that the fee was an unconstitutional taking because there was no nexus or rough proportionality between the fee and the impact of the seawall. He asserted that under the Act, Homeowners were entitled to a seawall to protect existing structures as long as they mitigated land loss. He noted that Homeowners had suggested a comprehensive regional approach to sand loss and nourishment along the entire coast, but the staff report recommended a mitigation fee instead. Thus, he argued that the fee was invalid because it

disproportionately concentrated responsibility for the natural process of beach erosion on Homeowners.

At a hearing on October 14, 2004, Homeowners urged the Commission to use the $1 million mitigation fee to fund a Geological Hazard Abatement District to study and develop a comprehensive regional erosion program rather than to buy coastal property elsewhere, which, they argued, would neither protect nor restore the beach at the complex.

After further public comment, all but one commissioner agreed to require a mitigation fee. However, two amendments were offered. One proposed using the fee for a regional erosion plan as urged by Homeowners, but that proposal was defeated. Commissioner Nava proposed adopting the $5.3 million mitigation fee calculated under the economic recreational value method. He asserted ***224** that the Commission ****439** had been underestimating the value of public land and opined that "what you have in this situation, is a private taking of public land, for the benefit of the private landowners, because that is what the law says they are entitled to do, as it relates to armoring of the shoreline, so that the structure is protected." Citing information in the staff report, he argued that the fee should be based on the value of the lost recreational benefits, which, he noted, was greater than the $1 million dollars estimated under the land-value method.

The District Director of the Commission reminded the Commissioners that the $5.3 million represented the *cumulative* loss of recreational value over 50 years and the net amount of the fee would depend on how it was paid. When one commissioner inquired about a lump-sum payment or amortization, Commissioner

Nava responded that he simply proposed adopting the fee as calculated in the report, and staff could work out the details of payment.

Before the Commission voted, Mr. Larsen urged the Commission to reconsider the geological hazard district because it could provide a funding mechanism to raise many more millions of dollars for a comprehensive shoreline protection plan. He also reiterated his claim that a fee to purchase property was unconstitutional.

Thereafter, the Commission voted to adopt the Nava amendment.

Later, in November 2004, staff revised the report in accordance with the Commission's decision. The new report proposed a finding that the economic recreational value method "is the *most* attractive method because it is based on an analysis of the actual beach recreational values in the vicinity of the project. *This method is a more accurate reflection of what the state is actually losing as a result of this project.*" FN4 (Italics added.) The revised report further explained that the fee would be paid in five yearly installments, and the actual amount paid would be $2,150,054, or $430,011 per year for five years, which, using a three percent discount rate, represented the present value of 50 yearly installments that would eventually total $5.3 million. The revised report was then re-circulated.

> FN4. We italicize changes that staff made to the original report. Otherwise, the revised finding reiterated all of the information in the original report verbatim.

A hearing was held on December 9, 2004, to determine whether to adopt the revised findings. At that time, the Commissioners questioned whether they had

authorized staff to discount the $5.3 million fee to present value and continued the hearing to review a transcript of the previous hearing.

***225** At the continued hearing on January 13, 2005, Homeowners challenged the discount rate used by staff as too low and complained that the Commission had improperly delegated authority to determine how the fee would be paid.

Mr. Larsen sought to raise some new issues that had come up after the October hearing. FN5 However, staff counsel advised ****440** Mr. Larsen that the only question before the Commission was "whether the revised findings reflect the action of the Commission," which would include discussion about the implementation of the mitigation fee. (*See* Cal. Code. Regs., tit. 14, § 13096, subd. (c).) FN6 When Mr. Larsen asked if he could submit a letter, counsel advised him that he could not now raise claims that could and should have made in October before the Commission took action to impose the fee.

> FN5. For example, in a letter after the October hearing, Mr. Larsen complained of "irregularities" during the hearing. Among other things, he asserted that neither Commissioner Nava nor the staff had made an individualized determination that the amount of the fee was warranted or appropriate. In this regard, he noted that Commissioner Nava and the staff report had made references to Huntington Beach, but no effort had been made to compare or contrast it with the Monterey Beach. Indeed, he noted that the staff initially had not recommended use of the economic recreational value

method, and staff had acknowledged that there had not been any studies to support the assumptions underlying the calculation of a $5.3 million fee and therefore that the calculation was based on what was "'probably a reasonable estimate'" of expenditures. Mr. Larsen also noted a lack of evidence to show that the same number of people use the Del Monte beach as other beaches in the area. In short, he claimed that the lack of an individualized determination was a significant flaw because the amount of the fee calculated under the economic method could vary widely depending on data concerning per person expenditures and number of annual visitors. Accordingly, he claimed the fee was both unjustified and not supported by substantial evidence.

FN6. California Code of Regulations, title 14, section 13096, subdivision (a) provides: "All decisions of the commission relating to permit applications shall be accompanied by written conclusions about the consistency of the application with [the Public Resources Code] and findings of fact and reasoning supporting the decision."

The regulations recognize that decisions of the commission will sometimes be "different than those proposed by the staff in the staff recommendation . . . ." (Cal. Code Regs. Tit. § 14, 13090, subd. (d).) When that occurs, the prevailing commissioners must "state the basis for their action in sufficient detail to allow staff to prepare a revised report with

> proposed revised findings that reflect the action of the commission." (*Id.*,§ 13096, subd.(b).) The commissioners must then approve the revised findings at a public hearing. "The public hearing shall solely address whether the proposed revised findings reflect the action of the commission." (*Id.*,§ 13096, subd. (c).)

The Commissioners then discussed whether the revised findings reflected the action they had taken in October and, finding that they did, adopted them.

JUDICIAL PROCEEDINGS

In their petition for a writ of administrative mandate, Homeowners challenged the Commission's finding concerning the loss of recreational use and lateral access, pointing to a lack of evidence that anyone used the beach at the ***226** complex and their agreement to provide alternative access. Homeowners also challenged the $5.3 million fee because it was not based on a specific study of the Monterey beach, and there was no evidence to support a recreational value of $13 per person.

Homeowners also claimed that the fee was an unconstitutional taking because there was no nexus or rough proportionality between the fee and the impact of the seawall. They noted that the fee would be used to buy land elsewhere and could ultimately be used to develop alternative recreational opportunities.

Last, Homeowners claimed that the fee was arbitrary and based on post-hoc rationalization because the Commission first decided to increase the fee from $1 million to $5 million and then sought a justification for doing so.

The trial court denied the petition. It found that Homeowners had failed to exhaust their administrative remedies, and thus preserve for judicial review, claims concerning (1) the alleged loss of public access and recreational use, (2) the method of calculating the amount of the fee, (3) authorization for a fee under the Act and (4) the sufficiency of alternative lateral access because they had not raised those claims before or at the October 2004 hearing at which the Commission decided to require the fee. **441 (*Styne v. Stevens* (2001) 26 Cal. 4th 42, 56, 109 Cal. Rptr. 2d 14, 26 P.3d 343 [exhaustion of administrative remedy a prerequisite for judicial review]; *Ralph's Chrysler-Plymouth v. New Car Dealers Policy Appeals Bd.* (1973) 8 Cal.3d 792, 794, 106 Cal. Rptr. 169, 505 P.2d 1009 [same]; *see, e.g., McAllister v. County of Monterey* (2007) 147 Cal. App.4th 253, 287-288, 54 Cal. Rptr. 3d 116.)

The court concluded that the mitigation fee was constitutional, finding the requisite nexus and rough proportionality between the fee and the impact of the seawall. The court further found that the Act did not limit what kind of mitigation the Commission could require. Last, the court rejected Homeowners' "post-hoc rationalization" claim, finding that the Nava amendment to increase the fee was based on the previous analysis and determination in the staff report concerning the recreational value of an acre of beach.

STANDARD OF REVIEW ON APPEAL

[1] Section 30801 gives anyone who appears at a public hearing or informs the Commission of concerns the right to judicial review of a decision by filing a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5. (*La Costa Beach*

Homeowners' Assn. v. California Coastal Com. (2002) 101 Cal. App.4th 804, 814, 124 Cal. Rptr. 2d 618.) "'The inquiry in such a case shall extend to the questions of whether [the Commission] has ***227** proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.'" (*Ibid.*) An abuse of discretion is established if the Commission failed to proceed in the manner required by law, its order or decision is not supported by the findings, or its findings are not supported by substantial evidence. (*Ibid.*; *Eden Hosp. Dist. v. Belshe* (1998) 65 Cal.App.4th 908, 915-916, 76 Cal. Rptr. 2d 857; § 30801; Code Civ. Proc. § 1094.5, subd. (b).)

[2][3][4] The trial court presumes that the agency's decision is supported by substantial evidence, and the party challenging that decision bears the burden of demonstrating the contrary. (*Desmond v. County of Contra Costa* (1993) 21 Cal. App.4th 330, 336, 25 Cal. Rptr. 2d 842; *Saad v. City of Berkeley* (1994) 24 Cal. App. 4th 1206, 1212, 30 Cal .Rptr. 2d 95.) In reviewing the agency's decision, the court examines the whole record and considers all relevant evidence, including that evidence which detracts from its decision. (*Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal. App. 4th 493, 503, 83 Cal. Rptr. 2d 850.) "Although this task involves some weighing to fairly estimate the worth of the evidence, that limited weighing does not constitute independent review where the court substitutes its own findings and inferences for that of the Commission. Rather, it is for the Commission to weigh the preponderance of conflicting evidence, as [the court] may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it."

(*Kirkorowicz v. California Coastal Com.* (2000) 83 Cal. App.4th 980, 986, 100 Cal. Rptr. 2d 124; *Sierra Club v. California Coastal Com.* (1993) 12 Cal. App. 4th 602, 610, 15 Cal. Rptr. 2d 779.)

On appeal from the denial of a petition, our role is identical to that of the trial court. (*Bolsa Chica Land Trust v. Superior Court*, *supra*, 71 Cal. App. 4th at p. 503, 83 Cal. Rptr. 2d 850; *Saad v. City of Berkeley*, *supra*, 24 Cal. App. 4th at p. 1212, 30 Cal. Rptr. 2d 95; *Sierra Club v. California Coastal Com.*, *supra*, 12 Cal. App. 4th at p. 610, 15 Cal. Rptr. 2d 779; *Barrie v. California Coastal Commission* (1987) 196 Cal. App. 3d 8, 14, 241 Cal. Rptr. 477.)

****442 CONSTITUTIONALITY OF THE MITIGATION FEE**

Homeowners reiterate their claim that the mitigation fee is unconstitutional because there is neither a nexus nor rough proportionality between it and the impacts of the seawall.

The Nexus and Rough Proportionality Requirements

[5][6] "The state and federal Constitutions prohibit government from taking private property for public use without just compensation." ***228** (*Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 773, 66 Cal. Rptr. 2d 672, 941 P.2d 851; Cal. Const., art. I, § 19; U.S. Const., 5th Amend; *Chicago Burlington Q. R. Co. v. Chicago* (1897) 166 U.S. 226, 239, 17 S. Ct. 581, 41 L. Ed. 979 [applying the federal takings clause to the states].) A land-use regulation constitutes a taking that requires compensation if it "'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" (*Lucas v. South*

Carolina Coastal Council (1992) 505 U.S. 1003, 1016, 112 S. Ct. 2886, 120 L. Ed.2d 798, quoting *Agins v. Tiburon* (1980) 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed.2d 106, italics omitted.)

In *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed.2d 677(*Nollan*), the United States Supreme Court explained what sort of connection satisfies the requirement that a permit substantially advance a state interest. (*Id.* at pp. 835, 837, 107 S. Ct. 3141.) There, the Commission allowed the Nollans to replace a small beachfront bungalow but required that they grant a public easement across their property on the beach because the new larger house would interfere with visual access and create a psychological barrier to using the beach. (*Id.* at pp. 828, 838, 107 S. Ct. 3141.)

The court explained that the power to impose a permit condition derived from the power to deny a permit. Thus, "a permit condition that serves the same legitimate police-power as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." (*Nollan*, *supra*, 483 U.S. at p. 836, 107 S. Ct. 3141.) Assuming that the permit could have been denied to protect visual access and overcome psychological barriers, the court opined that the Commission could impose permit conditions that served those same purposes. (*Id.* at pp. 835-836, 107 S. Ct. 3141.) However, the court overturned the easement condition because requiring the Nollans to provide access to people already on the beach did nothing to promote visual access to the beach or overcome psychological barriers to its use. (*Id.* at p. 838, 107 S. Ct. 3141.) Thus, because the required easement lacked a

"nexus"—i.e., a logical link—to the alleged impact, the condition caused an unconstitutional taking. (*Id.* at p. 837, 107 S. Ct. 3141; *see also, e.g., Surfside Colony, Ltd. v. California Coastal Com.* (1991) 226 Cal. App. 3d 1260, 277 Cal. Rptr. 371 [absent evidence that project would cause erosion, no nexus between it and a permit condition requiring lateral beach access].)

In *Dolan v. City of Tigard* (1994) 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed.2d 304 (*Dolan*), the court held that in addition to having a nexus with projected impacts and a permit condition must also be sufficiently connected in nature and extent. (*Id.* at pp. 386, 388, 114 S. Ct. 2309.)

There, the city allowed Dolan to expand her store and pave a gravel parking lot. But because part of her property was in the floodplain, the city ***229** required her to dedicate that part for a public greenway to mitigate a projected increase in drainage. It also required her to dedicate property ****443** next to the greenway for a pedestrian and bicycle pathway to mitigate a projected increase in traffic to the store. (*Dolan, supra*, 512 U.S. at pp. 379-381, 114 S. Ct. 2309.) The Court found a nexus between a dedication of land and the need for additional drainage and a dedication for a path and the need to reduce vehicular traffic. (*Id.* at pp. 387-388, 114 S. Ct. 2309.) The court then focused on whether the city's finding that the dedications were "reasonably related" to projected impacts established a sufficient connection between the extent of the projected impacts and required dedications. (*Id.* at pp. 388-389, 114 S. Ct. 2309.)

To establish the applicable standard for the sufficiency of a connection, the court turned to state court decisions. Some states considered "very generalized

statements as to the necessary connection between the required dedication and the proposed development" to be sufficient. (*Dolan*, *supra*, 512 U.S. at p. 389, 114 S. Ct. 2309.) The court rejected that approach because it was "too lax" to protect the constitutional right to just compensation. (*Ibid.*) A few other states required "a very exacting correspondence, described as the 'specifi[c] and uniquely attributable' test[,]" under which "if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes 'a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations.' [Citations.]" (*Id.* at pp. 389-390, 114 S. Ct. 2309.) The court rejected that approach, finding that the federal constitution did not require such "exacting scrutiny, given the nature of the interests involved." (*Id.* at p. 390, 114 S. Ct. 2309.)

The court ultimately adopted an intermediate approach favored by most states and held that there must be "rough proportionality" between a condition and extent of the impact it is supposed to mitigate. (*Dolan*, *supra*, 512 U.S. at pp. 390-391, 114 S. Ct. 2309.) The court explained, "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Id.* at p. 391, 114 S. Ct. 2309, fn. omitted, italics added.)

Turning to the facts, the court observed that if the dedication of property in the floodplain was designed to facilitate drainage, that purpose could as readily be served by simply prohibiting further development. Thus, a public dedication of land went beyond what

was necessary. Because the city had failed to make findings sufficient to justify it, the required dedication lacked rough proportionality with the impact it was designed to mitigate. (*Dolan*, *supra*, 512 U.S. at pp. 393-394, 114 S. Ct. 2309.) In contrast, the court opined that if Dolan's project were to encroach on the existing public greenway space, "it would have been reasonable to require [her] to provide some alternative greenway space for the public either on her property or elsewhere." (*Id.* at p. 394, 114 S. Ct. 2309.)

***230** The court also found that the dedication for a path was not roughly proportional to the impact on traffic because the city had not demonstrated a sufficient relationship between the number of additional vehicle trips the new store would generate and requiring land for a path. Rather, the city had simply found that a pathway "'*could* offset some of the traffic demand . . . and lessen the increase in traffic congestion,'" which, the court found, was "a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand. [Citation.]" ****444** (*Dolan*, *supra*, 512 U.S. at p. 395, 114 S. Ct. 2309, italics in *Dolan*.) The court explained, "No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated." (*Id.* at pp. 395-396, 114 S. Ct. 2309.)

The Nollan-Dolan Test and In Lieu Mitigation Fees

Both *Nollan* and *Dolan* involved permit conditions that required the dedication of land or an interest in land. However, the *Nollan-Dolan* test is not limited to such conditions. In *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429 (*Ehrlich*), the California Supreme Court held that the test also applied to ad hoc mitigation fees. (*Id.* at pp. 875-876, 881, 50 Cal. Rptr. 2d 242, 911 P.2d 429 (plur. opn. of Arabian, J.); accord, *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 666-667, 117 Cal. Rptr. 2d 269, 41 P.3d 87.) *Ehrlich* is particularly instructive here.

There, the owner of a private recreational facility, whose parcel was restrictively zoned for commercial recreational use, sought a zoning change to build condominiums. The city agreed to rezone the property but required an in-lieu fee of $280,000 for the development of new recreational facilities elsewhere. (*Ehrlich*, *supra*, 12 Cal.4th at p. 862, 50 Cal. Rptr. 2d 242, 911 P.2d 429.) The court found the requisite nexus between the loss of recreational facilities and the imposition of an in-lieu mitigation fee to develop new ones. (Id. at pp. 881-882, 50 Cal.Rptr.2d 242, 911 P.2d 429 (plur. opn. of Arabian, J.).) However, the court concluded that the amount of the fee was not roughly proportional to the impact of the zoning change.

The court noted the lack of "individualized findings" to establish a connection between the amount of the fee and the loss of the restrictive zoning on the parcel. The city argued that the fee was partial compensation for the loss of $800,000 in recreational improvements on the property. However, the court pointed out that

the impact to be mitigated was the loss of the restrictive zoning not the loss of recreational improvements on the property. (*Ehrlich*, *supra*, 12 Cal.4th at p. 883, 50 Cal. Rptr. 2d 242, 911 P.2d 429 (plur. opn. of Arabian, J.).) The city also asserted that if it had denied the zoning change, four new private tennis courts would have been built. Thus, the zoning change resulted in the ***231** loss of four new courts, and the fee represented the cost of building them. The court again found the amount of the fee unjustified because the cost of private courts would have been paid by the members of the private club, and the general public would not have access to them. "Thus, under the city's formula, the public would receive, ex gratia, $280,000 worth of recreational facilities the cost of which it would otherwise have to finance through membership fees. [The owner] is being asked to pay for something that should be paid for either by the public as a whole, or by a private entrepreneur in business for a profit. The city may not constitutionally measure the magnitude of its loss, or of the recreational exaction, by the value of facilities it had no right to appropriate without payment." (*Ibid.* (plur. opn. of Arabian, J.).)

The court opined, however, that the city could impose a fee that was "tied more closely to the actual impact of the land-use change the city granted plaintiff," such as a fee to help defray the administrative cost of rezoning other property for commercial recreational use; or a fee to mitigate a decrease in the city's ability to attract ****445** private recreational development and defray the costs of inducing such development. (*Ehrlich*, *supra*, 12 Cal.4th at p. 884, 50 Cal. Rptr. 2d 242, 911 P.2d 429 (plur. opn. of Arabian, J.).) In addition, although the city could not have required the

owner to dedicate the same amount of land for public recreational facilities, it could require the owner to transfer the former zoning designation to a comparable property that the owner had, which could then induce the development of another private recreational facility at that site. And if such a transfer were impractical, then the city could "surely levy an in-lieu exaction to accomplish the same objective. Such a fee would serve the same purpose as do all development fees: providing the city with a means of escaping the narrow choice between denying plaintiff his project permit altogether or subordinating legitimate public interests to plaintiff's development plans." (*Ibid.* (plur. opn. of Arabian, J.).)

The Nexus Between the Seawall and the Mitigation Fee

[7] We first determine whether there is a nexus between the projected impact of the seawall and the mitigation fee.

It is beyond dispute that California has a legitimate interest in protecting and maintaining its beaches as recreational resources. That interest is embodied in the Act, which declares as one of its goals the need to "maximize recreational opportunities in the coastal zone . . . ." (§ 30001.5; *La Costa Beach Homeowners' Assn. v. California Coastal Com., supra,* 101 Cal. App. 4th at p. 815, 124 Cal. Rptr. 2d 618.) Thus, the Act requires that every coastal development permit include a specific finding that it conforms to "public recreational policies" set forth elsewhere in the Act. (*See* §§ 30604, ***232** subd. (c), 30210 [requiring that "recreational opportunities" be provided], 30213 [requiring that "recreational facilities" be "protected, encouraged, and where feasible, provided"], 30220

[requiring the protection of coastal areas suited for "recreational activities" not available inland], 30221 [requiring the protection of oceanfront land "suitable for recreational use" for present and foreseeable future demand for such activities].)

Next, we note that both the City's EIR and the Commission's report and ultimate findings explained that the seawall would cause passive erosion that would eventually eliminate an acre of beach in front of the complex. Both reports opined that the resulting loss of continuous lateral access could be mitigated by alternative access through the complex's parking lot. However, the loss of beach and its recreational use were unavoidable impacts, and there was no feasible way to directly mitigate them.

Although the City considered the loss of recreational use an insignificant impact, the Commission, in accordance with its mandate under the Act to maximize, maintain, and protect recreational use, concluded that the loss required mitigation. Since the erosion of beach was inevitable and unavoidable, the Commission imposed an in-lieu mitigation fee to develop substitute recreational opportunities elsewhere. Clearly, there is a nexus—i.e., a logical connection—between the purpose of the mitigation fee and the loss of a recreational resource due to the seawall. (Cf. *Ehrlich*, *supra*, 12 Cal.4th at pp. 881-882, 50 Cal. Rptr. 2d 242, 911 P.2d 429 (plur. opn. of Arabian, J.) [finding a nexus between the loss of recreational facilities and the imposition of an in-lieu mitigation fee to help develop recreational facilities elsewhere].)

Homeowners assert that *Nollan* forbids an in lieu mitigation fee that is not tailored to the direct, on-site

impacts of the proposed project, which here they identify as only the loss of beach and continuous lateral **446 access and a decrease in the sand supply. They note that according to both the EIR and staff report, there is no feasible way to save the beach, mitigate the loss of sand, or create new beach near the complex. Thus, they argue that purchasing beach property somewhere else has no tendency to mitigate the loss of beach at the complex. They also argue that because the economic recreational value method is based on expenditures by beachgoers, the resulting fee mitigates the economic losses to local businesses and not the loss of recreational use. In all, therefore, Homeowners claim that the mitigation fee has no more nexus with the impacts of the seawall than the required easement condition in *Nollan*. We disagree.

First, Homeowners' view of the impacts of the seawall fails to recognize the loss of recreational use as a distinct impact. *Nollan* did not involve such an impact. Moreover, the causal connection between the seawall and loss of *233 recreational use is as direct and specific as the connection between the Nollan's new house and its impact on the view of the beach. Furthermore, in *Nollan*, requiring an easement on the beach did not logically address the project's impacts on visual access and its psychological barrier to using the beach. Here, however, a fee to purchase beach for public recreation has a logical tendency to mitigate loss of recreational use on the beach at the complex. Finally, *Nollan* does not suggest that where a project has an unavoidable on-site impact that cannot be directly mitigated, the Commission may not require equivalent off-site mitigation. On the contrary, in *Dolan*, the court opined that if Dolan's expanded store encroached on the floodplain, making it impossible to

require her to keep the greenway area open and clear, the city could have required her to provide land some place else for the greenway. (*Dolan*, *supra*, 512 U.S. at p. 394, 114 S. Ct. 2309.) Similarly, in *Ehrlich*, the court opined that to mitigate the loss of a parcel restrictively zoned for recreational facilities, the city could have required Ehrlich to transfer that restrictive zoning designation to a different parcel or pay an in-lieu fee to help the city develop recreational facilities elsewhere. (*Ehrlich*, *supra*, 12 Cal.4th at p. 884, 50 Cal. Rptr. 2d 242, 911 P.2d 429 (plur. opn. of Arabian, J.); *see also La Costa Beach Homeowners' Assn. v. California Coastal Com.*, *supra*, 101 Cal. App. 4th 804, 124 Cal. Rptr. 2d 618 [upholding dedication of off-site property to mitigate on-site impact on view corridor].)

Last, we reject Homeowners' claim that the fee lacks a nexus because it was based on expenditures wholly unrelated to the loss of local sand supply. As long as the economic recreational value method used to calculate the fee represents a valid way to quantify recreational value, the fact that it relies in part on expenditures does not ipso facto preclude there from being a nexus between fee and impact. Indeed, as we shall discuss more fully below, because recreational use is not a commodity with a market price to reflect its value, certain types of expenditures must be used as a proxy in determining recreational value.

Rough Proportionality between the Seawall and the Mitigation Fee

We now focus on whether the mitigation fee is roughly proportional to the extent of the loss of an acre of beach and recreational use.

The Commission's computations (*see* fn. 3, *ante*) are beyond dispute: If it properly applied the method and the figures used were valid, then the ***234** mathematical result is correct. However, to determine whether the computation produced a fee that is roughly proportional to loss of recreational ****447** use, we must look behind the arithmetic and evaluate how the Commission analyzed the loss and measured it. FN7

> FN7. We acknowledge some tension between the nature of our inquiry and the trial court's ruling that Homeowners had failed to exhaust their administrative remedies concerning the method of calculating the fee. However, Homeowners did not forfeit their general claim that the fee lacks both a nexus and rough proportionality with the impacts of the seawall. And in our view, we cannot determine whether the $5.3 million fee is roughly proportional to the impact of the seawall unless we evaluate both the nature of the impact and the way its dollar value was measured. Nor can we determine whether the amount of the fee is supported by the Commission's findings and conclusions concerning the extent, nature, and dollar value of the loss, and whether those findings are supported by substantial evidence, unless we examine how the Commission analyzed recreational use and calculated its value.

To understand the Commission's analysis, we consider it helpful to summarize the economic recreational value method as explained in voluminous material that guided the Commission. (*See ante*, fn. 2.)

In addition to its value as a piece of real estate, a beach can be valued in two other ways: by its economic impact and by its intrinsic economic value as a recreational resource. The economic impact of a beach reflects the contribution that a beach makes to the economy in the form of income for businesses and employees and the related tax revenues for government. Basically, economic impact is determined by the number of beach visitors and the average amount each spends for all beach-related activity, including transportation, parking, food, recreational equipment, tours, restaurants, hotels, camping, etc. Knowing the economic impact is useful because it helps quantify the economic consequences to business and government from the loss of a beach due to storms, erosion, and pollution, and such information can then help guide decisions concerning how much to spend on beach protection, maintenance, and improvements, and whether to lobby for state and federal assistance commensurate with the level of tax revenues generated by the beach. (*See* King and Potepan, *supra*, *The Economic Value of California Beaches*, pp. 3088-3090; King, *supra*, *The Fiscal Impact of California Beaches*, pp. 3268-3296.)

Economic impact, however, does not measure recreational value. Generally, the recreational value of a beach is viewed as the difference between what a person is willing to pay to enjoy it and how much it actually costs to do so. This difference is called the consumer surplus, and it can be estimated using the travel-cost method, the Commission staff cited in the revised report.

Basically, the travel-cost method uses the average per person cost of getting to the beach—i.e., average

expenditures for tolls, mileage, gas, *235 parking, repairs—as a proxy for an admission price. As such, the average cost reflects at a minimum what a person is willing to pay to enjoy the beach and how much it costs to do so, that is, the consumer surplus of the beach. Thus, the total consumer value of a beach or its recreational value is determined by the number of beach visitors and the average cost per person of getting there. (*See* Leeworthy and Wiley, *supra*, pp. 2998-3006; Ulibarri and Wellman, *supra*, *Natural Resources Valuation: A Primer on Concepts and Techniques*, pp. 3138-3148.)

The travel-cost method and economic impact analysis are similar, in that both are based on expenditures and the number of visitors. However, they are fundamentally different. The former uses only the costs of getting to the beach and measures recreational value; the latter uses all **448 beach-related expenditures and measures the benefit to the economy. With this distinction in mind, we turn to the Commission's analysis.

The revised report cited studies showing that California beaches contribute billions of dollars to the economy in terms of expenditures for everything from hot dogs to hotels. The report further noted that beaches also have intrinsic recreational value or consumer surplus, which is commonly determined under the travel-cost method, which focuses on average transportation costs. The report stated that to set an adequate mitigation fee, "it is necessary to determine general beach attendance in the area as well as an average daily beach expenditure/non-market consumer surplus value per person. An important piece of beach valuation method is the identification of consumer

expenditures related to beach recreation." The report then noted that although there are no studies of "beach expenditures" in the Monterey Bay area, a 1999 study of five beaches in the Huntington Beach area found a range of daily, per person beach-related expenditures depending on the particular beach from around $6 to $23, or an average expenditure of $13 per person. That study, which is part of the record, focused on the economic impact of those beaches on tax revenues and its conclusions are based on expenditures for everything from transportation to lodging.

Although this passage suggests that the Commission may have considered all beach-related expenditures, which would be relevant only in determining economic *impact*, the remainder of the report dispels that suggestion and reveals a proper focus on recreational value and consumer surplus.

The report observed, "In other studies, non-market consumer surplus estimates range from a low of $10.98 (in 2001 dollars) for visits to Cabrillo Beach in Los Angeles County to a high of greater than $70.00 (in 2001) dollars) per person per trip for visits to San Diego beaches." This information comes almost verbatim from a draft of a study on the potential economic ***236** benefits of improving the oceanic observational technology in Southern California. That study cited the sources of the consumer surplus figures for the Cabrillo and San Diego beaches, and the Cabrillo source—Leeworthy and Wiley (1993)—and is included in the administrative record and confirms the consumer surplus information.

The revised report next cited a lengthy study of litigation concerning an oil tanker spill off Huntington Beach, in which the jury awarded damages for the

temporary loss of recreational use based, in part, on an estimate of consumer surplus of around $13 per person per visit. The record also includes the study of the oil spill case—American Trader study—which confirms the information concerning the average consumer surplus of the affected beaches.

The report acknowledged that "[w]ith respect to economic value of Monterey's beaches, there have been no specific economic studies done regarding the per-person beach expenditures in the Monterey area." However, the report opined that the $13 per person per visit "is probably a reasonable estimate for the consumer surplus of the beaches in the Monterey area." The report pointed out that the consumer surplus Huntington Beach area would be $1 or $2 higher today due to inflation. The report recognized that the Monterey beach is not as highly developed as those near Huntington Beach but noted various qualities—equipment rentals, beach hotels, shops, restaurants; the wide, sandy quality of the beaches; and their location in a popular, urbanized area on the Central Coast—that nevertheless made it desirable and warranted an equivalent consumer **449 surplus. Moreover, the report noted that more recent research suggests that the consumer surplus of Southern California beaches is somewhat lower. Thus, the report ultimately found that $13 per person consumer surplus "is a reasonable and conservative estimate for the Monterey area."

In support of this finding, the report noted a staff communication with Professor Linwood Pendleton, who authored one of the studies cited in the report. The record contains an e-mail from Charles Lester, the Commission's District Director, to Professor Pendleton

concerning the value of lost recreational use on an acre of beach in which he asked whether there was a better estimate of per person consumer surplus than $13 and whether the approach in the report was defensible.

Professor Pendleton replied that the method was defensible. Concerning the $13 figure, he stated, "We still do not have a definitive value/person in Southern California. First, the value per beach day is probably going to be greater for Monterey beach goers (than SoCal beach goers) because they make fewer trips due to a shorter season. Second, there are fewer substitutes in Monterey Bay (so that also pushes the price up). Third, I think the summer ***237** time value per beach day (per person) in SOCAL is going to be between $7 and $10. In other words, your figure of $13 is going to be very close and defensible given the best available data."

As noted, *Dolan* required the Commission to make an individualized determination that the fee is related to the impact of the seawall in nature and extent. Moreover, that determination could not be based on general and conclusory findings that the fee is reasonably related to the impact; rather, the Commission had to make "some effort to quantify" the relationship between fee and impact. (*Dolan*, *supra*, 512 U.S. at p. 395, 114 S.Ct. 2309.)

[8] Here, the Commission went far beyond the determinations found inadequate in *Dolan* and *Ehrlich*. Although neither case provides examples of what would satisfy the "rough proportionality" standard, we have no difficulty concluding the Commission's determination did and that the amount of the fee is roughly proportional to loss of recreational use. Indeed, although the Commission was not

required to make a precise mathematical calculation, show an exacting correspondence between fee and the loss of recreational value, or demonstrate that the fee was directly proportional to the loss (*Dolan*, *supra*, 512 U.S. at pp. 389-391, 114 S. Ct. 2309), that is what it did.

Homeowners again assert that because the fee is based on expenditures, it represents the projected economic losses to local businesses and the tourist industry rather than the impact on the local shoreline sand supply. They claim that just as it was error in *Ehrlich* to measure the impact of a zoning change by the cost of new tennis courts, here it was error to measure the impact on the sand supply by the loss of beach-related expenditures. Thus, they argue that the fee cannot possibly be roughly proportional to the impact of the seawall.

Again, Homeowners fail to consider the loss of recreational use as a direct impact of the seawall and thus a proper focus of separate mitigation. Moreover, the economic studies establish the travel-cost method as a valid and accepted way to quantify recreational value and thus put a dollar value on the loss of recreational use. Although it would have been incorrect to measure that loss by the economic impact of an acre of beach, the Commission's analysis properly focused on the economic recreational **450 value and relied on pertinent data concerning consumer surplus.

In sum, we find both a proper nexus and rough proportionality between the mitigation fee and the impact of the seawall on recreational use. Thus, we reject Homeowners' claim that the fee is an unconstitutional taking.

*238 SUFFICIENCY OF THE EVIDENCE

[9] Homeowners claim that the amount of the fee is not supported by substantial evidence in that (1) it was not based on a study of the recreational value of the Monterey beach; (2) the use of data concerning consumer surplus elsewhere, specifically the $13 per person surplus at Huntington Beach, to calculate the recreational value was arbitrary and unreasonable because the climate and temperature at Southern California beaches are more conducive to beach recreation and the public accommodations are more developed there than they are at the Monterey beach; and (3) there was no evidence that the public even uses the acre of beach at the complex for recreation.

First, the lack of a specific study of the beach in Monterey and the Commission's reliance on studies of other California beaches do not establish that the mitigation fee lacks sufficient evidentiary support. The Commission acknowledged the lack of a Monterey study; and in relying on other studies, the Commission adopted an analytical approach called benefit transfer, which was outlined in the EPA *Guidelines* at pages 86-87 and applied by the State in the *American Trader* oil spill litigation to estimate the recreational value of the beaches that were despoiled. (*American Trader* study, pp. 3, 5-6, 11-12.) As explained in the EPA *Guidelines*, original economic studies are expensive and time-consuming. The benefit-transfer approach can reduce both the time and cost of determining the value of non-market benefits such as recreational use. (EPA *Guidelines*, at p. 86.) Under this method, the literature is surveyed for pertinent studies-called study cases-and their information is evaluated for equivalence, quality, and relevance. Differences and

variables between the study case and the new case-called the policy case-are analyzed to determine whether it is reasonable and appropriate to apply data to the policy case, and if so whether to do so with or without informed adjustments. (*Id.* at pp. 86-87.)

For example, in the *American Trader* oil-spill litigation, rather than conduct an original travel-cost study of consumer surplus of the affected beaches, the State collected studies of the consumer surplus of other beaches in California, New England, and Florida. (*American Trader* study, pp. 11-12.) The State rejected studies of New England beaches because of economic and social differences in the recreational use of beaches and the quality, location, and cost of getting there. (*Id.* at p. 11.) The State also rejected the California studies because of a flaw in the method that was used to estimate the number of visitors or beach trips, a key factor in estimating consumer surplus. However, the State used the Florida study because it found that beach recreation plays a similar role in Florida and California and the demographics of beachgoers were sufficiently similar to make the consumer surplus of Florida beaches ($10.23 per person) a pertinent, if not conservative, estimate ***239** of consumer surplus of beaches in the Huntington Beach area when adjusted upward for inflation ($13.19 per person). (*Id.* at p. 12.)

Here, the revised report noted that although the beaches at Huntington Beach are more developed than the Monterey Beach, the Monterey beach had many ****451** amenities that make it an equally desirable recreational attraction. Finally, after consulting with Professor Pendleton, staff determined, and the report concluded, that it was reasonable to use the $13 per person estimate of consumer value without adjustment

for inflation because it probably underestimated the true consumer value of the Monterey Beach. Indeed, the figure comes well within the range of consumer surplus estimates noted in the report for Cabrillo Beach and San Diego beaches.

[10] Homeowners made no claim to the Commission suggesting, much less demonstrating, that it was inappropriate, unreasonable, or arbitrary to apply the benefit-transfer approach or adopt the Huntington Beach estimate of consumer surplus. As noted, however, they do so now based on differences in development, climate, and temperature.

Conceivably, differences in the level of development could mean that per person expenditures for *all* beach related activities might be higher in Huntington Beach than in Monterey. However, the Commission acknowledged the higher level of development at Huntington Beach and reasonably could have concluded that it was less significant in determining consumer surplus under the travel-cost method, which, as noted, considers only transportation costs. The Commission also could have reasoned that while greater development could make a beach more desirable and popular, those attributes affect the *number* of visitors to the beach more than the amount each pays to get there. Moreover, the Commission noted that the Monterey Beach had other attributes that made it attractive and popular. Accordingly, the Commission implicitly concluded that the difference in development levels did not render the Huntington Beach data inapplicable. There is no evidence to the contrary, and Homeowners fail to convince us that this conclusion was unreasonable or arbitrary.

Concerning climate and temperature, the record contains no comparison of the weather at Huntington Beach and the Monterey Beach. Thus, Homeowners have no factual basis to argue that climate differences made it unreasonable to use the Huntington Beach data. Moreover, climate and temperature also appear to be considerations that, like development, would affect the number of people who go to the beach rather than the cost of getting there. Finally, as Professor Pendleton opined in his response to the Commission Director's inquiry, the shorter season at Monterey Beach means ***240** fewer annual visitors than at Southern California beaches, which in turn suggests that the consumer value for the Monterey Beach is *higher* than it is for beaches in the south.

Homeowners also claim that it was unreasonable to rely on data developed in the *American Trader* litigation because that case involved the closure of miles of beach in Southern California and this case involves a 585-foot seawall on one acre of beach in Monterey. However, Homeowners fail to explain why the differences in the location and scale of the beach impact would affect the calculation of consumer surplus or render it unreasonable to apply benefit transfer.

Last, the Homeowners claim that there is no evidence that anyone used the beach near the complex implies that the mitigation fee had to strictly correspond to the value of recreational use that would be lost on that specific acre. However, the court in *Dolan* rejected such an exacting correspondence between mitigation and impact and instead required only rough proportionality. Here, the Commission used the average number of annual visitors to an acre of beach.

We do not find this approach to be arbitrary or unreasonable. ****452** The Monterey beach is not composed of a series of discrete and separate recreational acres of sand; rather, the acre at the complex is part of an undifferentiated, long, continuous stretch of beach, all of which is equally open to recreational use by people who come to any part of it. Thus, the Commission could reasonably view the entire stretch of beach as a single recreational resource whose total consumer surplus is *evenly* distributed over its entire length and breadth. Accordingly, the average number of annual visitors per acre was an appropriate basis upon which to calculate a fee that was roughly proportional to the impact of the seawall on recreational use.

In sum, we find that the mitigation fee is supported by substantial evidence.

STATUTORY AUTHORITY TO IMPOSE THE FEE

[11][12] Homeowners contend that section 30235 gave them the right to a seawall and prescribes the only constitutionally permissible basis for a permit condition: mitigating the impact on the local sand supply. Given that statutory restriction, they argue that the Commission lacked authority to impose a mitigation fee to develop recreational opportunity elsewhere.FN8

> FN8. Although the trial court found that Homeowners forfeited this claim, it nevertheless addressed it, concluding that section 30235 did not limit permit conditions to sand-loss mitigation.

> We disagree that Homeowners forfeited their claim. In a letter to the Commission, Mr. Larsen asserted that under the Act, property owners are entitled to seawalls when necessary to protect existing structures as long as there is mitigation for sand loss. He noted that the complex predated the Act, and a seawall is necessary to protect it from being undermined. He noted that Homeowners were being required to mitigate sand loss, provide alternative lateral access, and comply with other mitigation measures that are typically imposed on applicants. He also noted that Homeowners had suggested a comprehensive regional approach to sand loss and nourishment along the entire coast. We find this argument sufficient to preserve a claim that the Act limited permit conditions to the mitigation of sand loss. Ironically, however, despite taking this position, Homeowners accepted unrelated conditions concerning lateral access.

***241** Section 30235 provides, in relevant part, ". . . [S]eawalls . . . shall be permitted when required . . . to protect existing structures . . . and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply."

According to Homeowners, this language required the Commission to grant the permit and restricted the type of permit conditions. Moreover, they argue that this view follows from the rule of statutory interpretation that the expression of one thing—e.g., the mitigation of sand supply-implies the exclusion of others—e.g., the mitigation of other impacts.

The Commission argues that Homeowners erroneously view section 30235 "as a stand alone provision that prohibits the Commission from considering other provisions of the Act when considering a seawall permit application." We agree.

The language of section 30235 is permissive, not exclusive. It allows seawalls under certain conditions: (1) when necessary to protect existing structures and (2) when they can be designed to minimize sand loss. The statute does not purport to preempt other sections of the Act that require the Commission to consider other factors in granting coastal development permits. (E.g., §§ 30604, subd. (c) [the Commission "shall" make findings that the permit complies with public access and recreational policies]; 30251 [scenic and visual qualities of coastal areas "shall" be considered and protected as a resource of ****453** public importance]; 30240 [environmentally sensitive habitats "shall" be protected].) Nor does the statutory language purport to limit the Commission's duty to consider other impacts and discretion to impose conditions to mitigate them. Homeowners offer no legislative history to support their view of the statute. Moreover, had it been the Legislature's intent to limit permit conditions, one would reasonably have expected direct or express limiting language-e.g., seawalls shall be permitted, and the Commission may *only* impose conditions that mitigate sand loss; or seawalls shall be permitted, and the Commission may not impose any conditions other than those that mitigate sand loss.

[13] Furthermore, the rule of construction cited by Homeowners "is no magical incantation, nor does it refer to an immutable rule. Like all such ***242** guidelines, it has many exceptions . . . ." (*Estate of*

Banerjee (1978) 21 Cal. 3d 527, 539, 147 Cal. Rptr. 157, 580 P.2d 657.) "The maxim does not apply where its application would run counter to a well established principal of law [citation] or where the operation of the rule "'would contradict a discernible and contrary legislative intent.'"" (*Burns v. California Fair Plan* (2007) 152 Cal. App. 4th 646, 656, 61 Cal. Rptr. 3d 809, quoting *In re Michael G.* (1988) 44 Cal. 3d 283, 291, 243 Cal. Rptr. 224, 747 P.2d 1152.)

[14] The Coastal Act was enacted as a comprehensive scheme to govern land use planning for the entire coastal zone of California. (*Yost v. Thomas* (1984) 36 Cal. 3d 561, 565, 205 Cal. Rptr. 801, 685 P.2d 1152.) Its broad goals are protection of the coastline and its resources and maximization of public access. (*Landgate, Inc. v. California Coastal Com'n* (1998) 17 Cal. 4th 1006, 1011, 73 Cal. Rptr. 2d 841, 953 P.2d 1188.) One of its specific goals is to "maximize public recreational opportunities in the coastal zone" (§ 30001.5, subd. (c)), and it contains numerous mandatory provision toward this end. (*E.g.*, §§ 30210 [recreational opportunities "shall" be provided]; 30211 [development "shall" not interfere with access to the sea]; 30213 [recreational facilities "shall" be protected, encouraged, and provided]; 30220 [coastal areas suited for recreational activities "shall" be protected].)

Homeowners' interpretation of section 30235 tends to defeat this goal. Again, Homeowners provide no evidence suggesting that the Legislature intended to give protection of the sand supply exclusive priority over all of the Act's other goals.

Finally, even if section 30235 were reasonably susceptible of Homeowners' interpretation, we would reject it as inconsistent with the Legislature's express

command that the Coastal Act "be liberally construed to accomplish its purposes and objectives."(§ 30009; *Sierra Club v. California Coastal Com'n* (2005) 35 Cal. 4th 839, 849, 28 Cal. Rptr. 3d 316, 111 P.3d 294.)

[15] In short, we conclude that section 30235 does not limit the type of conditions that the Commission may impose in granting a permit to construct a seawall. Rather, the Commission has broad discretion to adopt measures designed to mitigate all significant impacts that the construction of a seawall may have. (*E.g., La Costa Beach Homeowners' Assn. v. California Coastal Com., supra*, 101 Cal. App. 4th at p. 817, 124 Cal. Rptr. 2d 618 [Commission has discretion to adopt appropriate mitigation measure to achieve goals of the Act even in the absence of express statutory authorization].) FN9

> FN9. In their reply brief, Homeowners emphasize that certain buildings would be lost without a seawall. They assert that denying a permit would constitute a taking and render the state liable in inverse condemnation. Therefore, citing *Nollan*, they claim that since denying the permit to preserve recreational use would constitute a taking, the imposition of a mitigation fee for that purpose also constitutes a taking.
>
> Even when we view the record liberally, we do not find that Homeowners made this claim to the Commission. Indeed, the claim has such far-reaching implications that it would have provided grounds to oppose *any* permit condition, including the conditions for access, seawall design, and sand loss mitigation.

> Under the circumstances, we find that Homeowners forfeited this claim.
>
> Moreover, Homeowners failed to raise it in their opening brief, where, citing *Nollan*, they claimed only that (1) the mitigation fee failed the *Nollan-Dolan* test; and (2) the mitigation fee was unauthorized because section 30235 limited permit conditions to sand loss mitigation. The merits of the latter claim hinged on Homeowner's interpretation of section 30235.
>
> Homeowners suggest that their new claim simply rearticulates the claim in their opening brief. We disagree and find it to be wholly different. The record fails to establish good cause for failing to raise their claim in the opening brief, and for that additional reason, we decline to address it. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal. App. 3d 325, 335, fn. 8, 265 Cal. Rptr. 788 [absent good cause, failure to raise claim in opening brief waives it].)

****454 *243 POST HOC RATIONALIZATON**

Homeowners contend that the mitigation fee is invalid because it is the result of a post-hoc rationalization process. They assert that at the first hearing, the Commission arbitrarily rejected the staff recommendation of a $1 million fee; and then, without considering or discussing which method most accurately measured the impact of the seawall, the Commission chose the $5.3 million fee solely because it wanted to get more than the $1 million recommended by staff. Then, after deciding to demand

more money, the Commission simply adopted the valuation method that supported their predetermined fiscal goal. In other words, the Commission decided on the $5.3 million figure arbitrarily and then adopted a rationale for it later.

In support of their claim, Homeowners cite *Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles* (1974) 11 Cal.3d 506, 113 Cal. Rptr. 836, 522 P.2d 12 (*Topanga*); *Bam, Inc. v. Board of Police Com'rs of City of Los Angeles* (1992) 7 Cal. App. 4th 1343, 9 Cal. Rptr. 2d 738(Bam), and *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal. App. 3d 1121, 219 Cal. Rptr. 365 (*Slauson*).

In *Topanga*, *supra*, 11 Cal.3d 506, 113 Cal. Rptr. 836, 522 P.2d 12, the court explained that an administrative agency "must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Id.* at p. 515, 113 Cal. Rptr. 836, 522 P.2d 12.)

In *Bam*, Bam operated a movie arcade and was charged with operating a place where customers could masturbate. The police board appointed a hearing examiner, who, in a detailed report, found no evidence to support the charges and thus no grounds to revoke Bam's permit. The police department disagreed and recommended a 30-day suspension. At a hearing, the board perfunctorily rejected the examiner's findings and recommendations and ***244** suspended Bam's permit for 30 days. When Bam requested findings, the board directed their preparation. However, before this was done, the Board issued its decision and only later did Bam receive the proposed findings, which, however, the board never adopted. (*Bam*, *supra*, 7 Cal. App. 4th at p. 1345, 9 Cal. Rptr. 2d 738.)

On appeal, the court stated, "Findings are not supposed to be a post hoc rationalization for a decision already made. To the contrary, they are supposed to 'conduce the administrative body to draw legally relevant sub-conclusions supportive of [the Board's] ultimate decision; the intended **455 effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions.' [Citation.]" (*Bam*, *supra*, 7 Cal. App. 4th at p. 1346, 9 Cal. Rptr. 2d 738.) The court continued, "Indeed, it is in this context-where the decision of the hearing examiner is rejected-that findings by the Board are critical. Had the Board simply adopted the examiner's recommendation, we would have no problem deeming the examiner's findings to be those of the Board. But where, as here, the Board rejects those findings, notwithstanding that it did not hear or see the witnesses, the reviewing court has to be told why that was done; so it can 'trace and examine the agency's mode of analysis.' [Citation.]" (*Ibid.*)

In *Slauson*, a redevelopment agency wanted to obtain a large portion of Slauson's parking lot to develop housing. However, before initiating an action to condemn the property and without any notice to Slauson, the agency entered into an agreement with a developer under which it would sell bonds to buy the property and transfer the property to the developer who would then build condominiums. Thereafter, the bonds were issued and sold. (*Slauson*, *supra*, 173 Cal. App. 3d at p. 1125, 219 Cal.Rptr. 365.)

On appeal, the court noted that as a condition precedent to exercise of the power of eminent domain, the agency must hold a public hearing to determine whether (1) the property is necessary for a public

project; (2) the project is in turn necessary for a public purpose; and (3) the taking of the particular property is compatible with the greatest public good and the least private injury. If the agency makes those determinations, then it must adopt a resolution of necessity. The court opined that the hearing and resolution requirements imply that, in arriving at deciding to condemn property, the agency must engage in "a good faith and judicious consideration of the pros and cons of the issue and that the decision to take be buttressed by substantial evidence of the existence of the three basic requirements . . . ." (*Slauson*, *supra*, 173 Cal. App. 3d at pp. 1125-1126, 219 Cal. Rptr. 365.)

Turning to the facts before it, the court concluded that "the hearing which led to the adoption of the resolution of necessity was a sham and the ***245** Agency's policy making board simply 'rubber stamped' a predetermined result." (*Slauson*, *supra*, 173 Cal. App. 3d at p. 1127, 219 Cal. Rptr. 365.) The court noted that by the time the agency held a hearing to determine necessity, it had "by virtue of its contract with the developer and issuance of revenue bonds, irrevocably committed itself to take the property in question, regardless of any evidence that might be presented at that hearing. All the while the owner had been misled, if not deceived, as to what fate was going to befall his property." (*Ibid.*)

Bam and *Slauson* are distinguishable and do not suggest that the Commission's decision is invalid. Long before the hearing, the original staff report put Homeowners on notice that the Commission would consider a fee to mitigate the loss of an acre of beach as a permit condition. The report provided a detailed analyses of three ways the fee could be determined,

each of which took a different perspective on the nature of the loss of beach: the loss of sand; the loss of real estate; and the loss of recreational value. Staff recommended the second way, which resulted in a fee of $1 million. However, staff admitted that its recommendation provided only partial mitigation and, in light of the economic recreational value method, underestimated the impact.

Later, at the hearing, Nava echoed the staff's admission and objected to the recommendation ****456** because its focus on real estate value underestimated the value of what was really being lost: recreational value. Accordingly, he recommended that the Commission adopt the economic recreational value approach, which was fully detailed in the report. Homeowners were given an opportunity to respond. And thereafter, the Commission voted to adopt the Nava amendment.

This is not a case like *Bam*, where the Police Board rejected a recommendation and made the opposite decision without ever making or adopting findings that explained or supported it. Nor is this a case like *Slauson*, where, without notice to the affected party and before holding a proper hearing, the agency made an unalterable decision and then conducted a sham hearing to rubberstamp that decision.

Here, the detailed explanation of the recreational value method and the resulting fee in the staff report provided an ample factual basis and explanation for the Commission's decision to reject the staff recommendation and adopt a different methodology and fee. Although the Commission sent the report back for revisions consistent with the action taken, doing so was necessary because the original report did

not reflect the Commission's findings and decision. Moreover, the revisions were relatively minor and cannot reasonably be considered a post hoc rationalization for a predetermined decision.

***246 DISPOSITION**

The judgment is affirmed. The Commission is entitled to its costs on appeal.

WE CONCUR: PREMO and ELIA, JJ.

Cal. App. 6 Dist., 2008.

Ocean Harbor House Homeowners Ass'n v. California Coastal Com'n

163 Cal. App. 4th 215, 77 Cal. Rptr. 3d 432, 08 Cal. Daily Op. Serv. 6326, 2008 Daily Journal D. A . R. 7603

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Appendix B–1

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

OCEAN HARBOR HOUSE HOMEOWNERS ASSOCIATION,

Petitioner/Plaintiff,

vs

CALIFORNIA COASTAL COMMISSION,

Respondent/Defendant.

Case No. M73109

ORDER AFTER SUBMISSION

Analysis:

This matter came on for court trial on August 3, 2006. All sides were represented through their respective attorneys. The matter was argued and taken under submission. This intended decision resolves factual and legal disputes, and shall suffice as a statement of decision as to all matters contained herein.

Background

The Monterey City Council (City) certified an environmental impact report (EIR) for a seawall to protect the Ocean Harbor House (Ocean Harbor) condominium complex from ocean swells and waves on December 2, 2003. Two significant impacts identified in the EIR were the negative visual impact of the seawall and the loss of the beach in front of the seawall. The consensus was that building the seawall

will in time allow the ocean to claim the sandy beach in front of the seawall and remove sand and dunes that exist laterally to the condominium complex. The City required that the seawall be designed to resemble a sand dune and that the public be provided access through the condominium complex to the beaches on either side of the complex. Ocean Harbor was required to obtain a permit for the seawall from the California Coastal Commission because the City does not have a fully certified Local Coastal Plan.

The Coastal Commission required numerous conditions and determined that because approximately one acre of beach would be lost, an in-lieu fee of $5.3 million dollars be imposed to purchase one acre of beachfront property in another location. Ocean Harbor seeks to overturn the $5.3 million exaction. The $5.3 million figure would be reduced to a present value of $2.1 million, if paid within five years.

Writ of Mandate—Standard of Review

In administrative mandate actions, the trial court determines whether there was a fair hearing and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the administrative body did not proceed in the manner required by law, its decision is not supported by the findings, or its findings are not supported by the evidence. (Code Civ. Proc., § 1094.5(b); Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 531, 556.) "Where it is claimed . . . the findings are not supported by the evidence, . . . abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (Code Civ. Proc. § 1094.5(c).) This approach mandates that a court consider all of the

relevant evidence in the administrative record and, resolving all doubts in favor of the agency's findings and decision, determine whether any reasonable person could have reached the same conclusion. (La Costa Beach Homeowners' Assn. V. California Coastal Com. (2002) 101 CA4th 804, 814.)

Where pure questions of law are involved, such as the interpretation of statutes or judicial precedents, the court exercises independent review. (Donaldson v. Department of Real Estate (2005) 134 Cal. App. 4th 948, 954.)

Discussion

Exhaustion of Administrative Remedies

Ocean Harbor argues that 1) there is no evidence in the record to support the findings regarding the impact of the project on public access and recreation, 2) the final decision to impose the $5.3 million fee is not supported by a) the findings, b) the Coastal Act or c) Constitutional takings law. Respondent, Coastal Commission, points out that Ocean Harbor did not make any arguments before or during the hearings, even when given an opportunity, to challenge the evidence regarding 1) public access and recreation on the beach, 2) the calculation of the fee, 3) whether the fee is authorized by the Coastal Act or 4) whether a path through the condominium's parking lot is not qualitatively equivalent to the path on the beach, and did not exhaust administrative remedies regarding these issues. (Evans v. City of San Jose (2005) 128 CA4th 1123, 1138.)

Ocean Harbor argues that they exhausted their administrative remedies by making their objections "known in some fashion, however, unsophisticated"

which comports with Pub Resources Code § 30801. (Park Area Neighbors v. Town of Fairfax (1994) 29 CA4th 1442, 1449.) Pub Resources Code § 30801 provides in relevant part that "an 'aggrieved person' means any person who, in person or through a representative, appeared at a public hearing of the commission . . . in connection with the decision or action appealed, or who, by other appropriate means prior to a hearing, *informed the commission . . . of the nature of his concerns* or who for good cause was unable to do either." (Italics added.)

Ocean Harbor's attorney sent a letter to the Coastal Commission on October 12, 2004 in order to exhaust administrative remedies. Ocean Harbor's focus at that time was on the Coastal Commission's proposed $1 million in-lieu fee that wold be used to purchase beachfront property elsewhere and that this exaction constituted a taking of Ocean Harbor's property. Ocean Harbor's attorney argued that there was no "nexus" as required by Nollan v. California Coastal Commission (1987) 483 US 825, nor did the exaction meet the "rough proportionality" test of Dolan v. City of Tigard (1994) 512 US 374. Ocean Harbor's attorney also argued that the $1 million exaction did not comply with Government Code §66000 et seq., the Mitigation Fee Act, because the Coastal Commission did not "identify the purpose to which the fee will be put, the failure to demonstrate a reasonable relationship between the fee and the purpose for which it is charged, the failure to identify all sources and amounts of funding anticipated to be used to finance the incomplete improvements and the failure to design the approximate dates on which the above funding is expected to be deposited into the appropriate account or fund."

Ocean Harbor's attorney raised several other issues. Ocean Harbor was concerned about the requirement that the entire $1 million be placed in a fund that was controlled by others, that Ocean Harbor would have to waive their rights to protest any aspect of the recommended approval and that the process that was involved in the conversion of the apartments to condominiums no affect the pre-existing status of the development in the application of the Coastal Act.

Ocean Harbor objected at the October 14, 2004 Coastal Commission hearing after the proposed $1 million fee was increased to $5.3 million. Ocean Harbor's attorney stated that he "fundamentally disagree[d] . . . that there is a nexus between buying—the problem that exists immediately, and buying sand or property elsewhere."

Ocean Harbor sent a follow up letter to the Coastal Commission on December 6, 2004. In it, Ocean Harbor's attorney requested that the fee be rescinded because it lacked the required "nexus" and "rough proportionality" and it was unfair, inappropriate and illegal for all the reasons stated in the October 12, 2004 letter and in the letter from Monterey's Mayor dated November 30, 2004. Ocean Harbor's attorney then argued that the October 14, 2004 hearing was irregular in several respects. Counsel maintained that neither Commissioner Nava, in making his motion to increase the exaction to $5 million, nor the Coastal Commission staff, made the "requisite individualized determination [Dolan at 391] that the fee amount was warranted" and although Commission Nava alluded to Huntington Beach beaches to justify his motion, there was no effort to compare or contrast Del Monte beach to Huntington Beach beaches. Ocean Harbor's attorney continues by

arguing that the Coastal Commission staff told Commissioner Nava that staff had prepared an economic analysis of the estimated recreation loss of the beach and that the $5.3 million in-lieu fee was warranted but the staff was not recommending this because there "was no individualized determination of the appropriateness of the underlying assumptions which support the conclusion that the fee amount is appropriate." In his letter to the Coastal Commission, Ocean Harbor's attorney cites to the staff report wherein staff states that "there are '. . . no specific economic studies done regarding the per-person beach expenditures in the Monterey area.'" The attorney points out that the staff opines that "the $13.00 figure [derived for Huntington Beach] is probable a reasonable estimate" and that staff relied on that assumption for the analysis.

Ocean Harbor's attorney goes on to state that the staff's conclusion that the beaches between Wharf #2 and Sand City are "functionally interrelated," would not be supported if a study had been prepared for Del Monte Beach because it is used less, due to the lack of access and parking. The attorney states that Ocean Harbor has pictures that document the limited use of the beach but they do not appear in the Administrative Record. The attorney argues that this lack of an individualized determination provides for a fee that can vary widely based on the underlying assumptions. The attorney also states that the fee cannot be justified because "the record does not contain substantial evidence supporting the imposition or the amount of the fee."

At the December 9, 2004 hearing before the Coastal Commission, which was held to focus on the

revised findings, not the merits of the October 14, 2004 decision, a representative of Ocean Harbor Homeowners Association disagreed with the findings in Condition 4 and argued that an appropriate fee for mitigation for the seawall should focus on solving the erosion problem that is applicable to the entire coast. The purpose of the December 9, 2004 hearing was to ensure that the revised findings reflected the action of the Commission at the October 2004 hearing. (Cal. Code Regs., tit. 14, §13096(c).) Ocean Harbor's opportunity to make its objections known was prior to or at the October 14, 2004 hearing.

The Mayor of the City of Monterey sent a letter to the Coastal Commission dated October 7, 2004. The City protested the imposition of a $1 million fee as a result of the loss of the beach in front of the condominium complex due to the seawall construction because the "nexus of this mitigation [construction of coastal trails] is tenuous at best." There is also a letter in the record from the City to the Coastal Commission dated December 8, 2004. The City argues that there is no nexus between the seawall and the $5.37 million fee to acquire recreation land elsewhere based on Nollan and that the exaction cannot meet the "rough proportionality" test of Dolan nor the "heightened scrutiny" standard of Ehrlich v. City of Culver City (1996) 12 C4th 854. The City's December 8, 2004 letter first appears as a November 30, 2004 draft letter to the Coastal Commission that accompanies a memorandum from the City Manager of Monterey to the Mayor and City Counsel dated December 2, 2004.

The question for the Court is whether Ocean Harbor "informed the commission . . . of the nature of [their] concerns" as required by Public Resources Code

§30801, so that the Coastal Commission could respond to any objections raised by Ocean Harbor. (Park Area Neighbors at 1449.)

Ocean Harbor argues and infers that less specificity is required to exhaust administrative remedies before the Coastal Commission by arguing that Evans is distinguishable because Health and Safety Code §33361 requires details be presented to an agency to exhaust, which they argue is not the case for Public Resources Code §30801. Health and Safety Code § 33361 provides only for "Notice of public hearing; Publication; [and] Contents" for the procedure to adopt redevelopment plans by a legislative body and does not directly address the specificity required to exhaust administrative remedies. Additionally, the court in Evans cites to the California Environmental Quality Act (CEQA) and cases discussing exhaustion of administrative remedies under Public Resources Code §21177 which states in pertinent part "(a) No action or proceeding may be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination. [¶] (b) No person shall maintain an action or proceeding unless that person objected to the approval of the project orally or in writing during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination."

The case citing exhaustion under Public Resources Code §21177 require that "the exact issue raised in the

lawsuit must have been presented to the administrative agency so that it will have had an opportunity to act and render the litigation unnecessary." (Resource Defense Fund v. Local Agency Formation Commission of Santa Cruz County (1987) 191 CA3d 886, 894.)

Exhaustion of administrative remedies before the Coastal Commission requires that Ocean Harbor have stated their legal and evidentiary objections with sufficient specificity to preserve them for litigation.

There appears to be no controversy that Ocean Harbor did exhaust administrative remedies as to the "nexus" and "rough proportionality" exaction issues. But, even if the Court considers the letters from Ocean Harbor and the City following the October 14, 2004 hearing, Ocean Harbor has not exhausted on the issues and legal theories regarding 1) public access and recreation on the beach, 2) the calculation of the fee, 3) whether the fee is authorized by the Coastal Act or 4) whether a path through the condominium's parking lot is not qualitatively equivalent to the path on the beach. The general statements by Ocean Harbor's counsel in the December 6, 2004 letter do not suffice. Additionally, the Coastal Commission hearing on December 9, 2004 was restricted to the revised findings, not the merits. Even if Ocean Harbor is given the benefit of the doubt as to be allowed to raise new issues at the December 9, 2004 hearing, the vague statement that there was no "requisite individualized determination," even when coupled with Ocean Harbor's cite to the Commission staff reporting that there were no studies in the Monterey area, that the $13.00 fee was a reasonable estimate, and Ocean Harbor's questions regarding the number of

beachgoers, does not provide the requisite specificity. Ocean Harbor was provided an opportunity to challenge the findings as modified at the October 14, 2004 hearing but Ocean Harbor only raised the issue of a nexus between the fee and buying property elsewhere. The letters from the City of Monterey only provide support for Ocean Harbor's exhaustion argument regarding a Constitutional taking. (Evans at 1137.)

Taking issue

"The Fifth Amendment to the United States Constitution states that 'private property [shall not] be taken for public use without just compensation.' Article I, section 19 of the California Constitution contains similar language, stating that governmental entities must pay just compensation when they 'take' private property for public use." (Home Builders Assn. v. City of Napa (2001) 90 CA4th 188, 195.) The police powers provide authority for exactions in the context of development if the fee substantially advances a legitimate government interest and does not deny all economic viable use of the property and there is a nexus between the fee and burden of development. (California Constitution Article XI, section 7; California Bldg. Indus. Ass'n v. Governing Bd. of the Newhall Sch. Dist. (1988) 206 CA3d 212, 234; Lucas v. South Carolina Coastal Council (1992) 505 US 1003, 1016; Nollan at 834.)

The Nollan part of the two-prong test to assess the exaction is the "essential nexus" standard, i.e., there must be an "essential nexus" between the government's legitimate state interest and the exaction imposed. (At 837.)

Ocean Harbor argues on the one hand that the seawall will result in the loss of sand and that any exaction should be joined with the creation of a Geologic Hazard Abatement District to support a regional approach to the loss of sand from Monterey beaches, and on the other, that because this case is about the loss of sand from the beach and access at Del Monte Beach, there is no nexus because the uses to which the fee may be put do not remedy the loss of access.

Here, the impact, or burden of building the seawall will be the loss of approximately one acre of public beach. The Coastal Commission has a strong interest in maintaining the public's right to have a beach to actually use for recreation (Public Resources Code §§30210, 30211), and the fee is to be used to purchase and provide for shoreline recreational property. This provides for an "essential nexus" in this instance.

The Dolan part is the "rough proportionality" standard with regard to the "degree of connection between the exactions and the projected impact of the proposed development." (At 386.) It does not have to be directly proportional, however. (Dolan at 390-391.) As the Dolan Court pointed out, "No precise mathematical calculation is required, but the [government] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (At 391.)

The Coastal Commission made extensive findings regarding the in-lieu fee. (AR 2269-2276.) It cites to a number of studies that quantified the economic value of beaches to determine the fee. The Commission

found that a $13.00 per day figure was a reasonable estimate for average beach expenditure for the Monterey area based on the studies. It also determined general beach attendance from State Parks data for Monterey State Beach. The Coastal Commission then calculated the fee using the $13.00 figure and the average daily visitors per acre of beach to value the acre of beach that will be lost. It then calculated how much beach would be lost per year over the 50 year lifespan of the seawall to arrive at the $5.3 million fee. The Coastal Commission then went on to find that the fee, as calculated by the economic beach valuation method, was required to protect maximum public access and recreation to and along the shoreline.

The fee is to be used "to purchase beachfront/dune property for the public recreation use in the southern Monterey Bay area" within a ten year period. Any monies remaining "after ten years will be donated . . . to the State Parks in southern Monterey Bay . . . or other organization acceptable to the [Coastal Commissions] Executive Director, for the purpose of providing public access and recreation improvements to and along the shoreline, including improvements to the California Coastal Trail." (AR 2241.)

Petitioner argues that Pub. Res. Code § 30235 places a limitation on any mitigation requirements to those that solely address local shoreline sand supply. But the language of that section is not so limiting. § 30235 simply addresses the care to be taken in the design of seawalls. It does not prohibit other legitimate mitigation requirements for the loss of public property.

Since it is conceded that there is no meaningful way to directly mitigate the loss of ths particular public beach, the Commission sought to do so by acquiring other beach property within the area to replace this loss to the public. The Court finds the plan to be an acceptable and practical designed mitigation.

The Coastal Commission made an individualized determination that the fee is related both in nature and extend to the impact of the seawall. The fee is an appropriate mitigation measure for the loss of one acre of public beach and its attendant public activates because the fee is to be used to purchase more beach property for public use or to in some manner provide public access and recreation to and along the beach. The "rough proportionality" test is met in this instance and Ocean Harbor's claim for a taking is denied.

Post hoc rationalization

Ocean Harbor argues that the Coastal Commission could not adopt revised findings to support the $5.3 million fee after it approved the seawall project because this means that the Coastal Commission did not "set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 C3d 506, 515.)

As mentioned above, Commissioner Nava made a motion to modify staff's recommendation at the October 14, 2004 hearing which was ultimately approved by the Coastal Commission. At the time of Commissioner Nava's motion, staff and the Executive Director pointed out that staff had prepared an

economic analysis for the loss of recreation on the one acre of beach. The Coastal Commission staff issued proposed revised findings for the December 9, 2004 meeting to support the Coastal Commission's October 14, 2004 approval.

Decisions of the Coastal Commission may be "different than those proposed by the staff . . ." (Cal. Code Regs., tit. 14, §13090(d).) The prevailing commissioners stated, in conjunction with the staff report, the basis for their action "in sufficient detail to allow staff to prepare a revised staff report with proposed revised findings that reflect the action of the commission." (Cal. Code Regs., tit. 14, §13096(b).) The Coastal Commission approved these revised findings at the December 9, 2004 hearing.

As in La Costa Beach, the revised findings in this case reflect the action taken by the Commission and there was no post hoc rationalization. (At 819.)

Disposition

Ocean Harbor's petition for writ of administrative mandamus to set aside the exaction is denied.

The court directs the attorney for the Coastal Commission to prepare an appropriate judgment consistent with this ruling, present it to opposing counsel for approval as to form, and return it to this court for signature.

DATED: SEP - 5 2006

/S/ ROBERT O'FARRELL
HONORABLE ROBERT A. O'FARRELL
JUDGE OF THE SUPERIOR COURT

CERTIFICATE OF MAILING

C.C.P. SEC. 1013A

I do hereby certify that I am not a party to the within stated cause and that on September 5, 2006 I deposited true and correct copies of the following documents: ORDER AFTER SUBMISSION in sealed envelopes with postage thereon fully prepaid, in the mail at Salinas, California, directed to each of the following named persons at their respective addresses, as hereinafter set forth:

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Dated: September 5, 2006

LISA M. GALDOS, Clerk of the
Monterey County Superior Court

By_____
Brenda Smart, Deputy

Appendix C–1

Court of Appeal, Sixth Appellate District–No. H031129

S164866

IN THE SUPREME COURT
OF CALIFORNIA

En Banc

OCEAN HARBOR HOUSE HOMEOWNERS ASSOCIATION, Plaintiff and Appellant,

v.

CALIFORNIA COASTAL COMMISSION, Defendant and Respondent.

The petition for review is denied.

The request for an order directing depublication of the opinion is denied.

SUPREME COURT

FILED

AUG 13 2008

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

No. 08-753

Supreme Court, U.S.
FILED
JAN 12 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

OCEAN HARBOR HOUSE
HOMEOWNERS ASSOCIATION,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Writ Of Certiorari To The California Court Of Appeal, Sixth Appellate District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When proposed development will destroy one acre of public beach and interrupt a two-mile stretch of continuous sandy beach, does an in-lieu mitigation fee for the project meet the rough proportionality requirement of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), where the agency imposing the fee uses an established economic method to quantify the lost recreational value to the public that will result from loss of the beach and imposes a fee equal to that loss to be used for replacement public recreational opportunities?

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CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V 5

STATEMENT

1. The California Coastal Commission (Commission) imposed the mitigation fee at issue in this case as a condition of a permit for construction of a protective seawall in front of petitioner Ocean Harbor House Homeowners Association's (petitioner) Monterey, California condominium complex. Pet. App. A-12. There is no dispute that the seawall will destroy one acre of public beach in front of the complex, and interrupt a two-mile stretch of continuous sandy beach in and adjacent to the City of Monterey. *Id.* at A-13.

Consistent with California Coastal Act requirements to maximize public recreational opportunities on the coast, the Commission required petitioner to pay an in-lieu mitigation fee to compensate for the loss of public recreational opportunities at the beach that will be lost because of the seawall. Pet. App. A-15. The Commission set the mitigation fee at $5.3 million payable over the 50 year life of the seawall, which would be $2.1 million if it is paid within five years. *Id.* at A-20-21. The Commission directed that the fee be used for purchase of beach front or dune property for public recreational use in the southern Monterey Bay area. *Id.* at A-15; AR 13:2241.

The Commission calculated the mitigation fee using a method known as the economic recreational value method. Pet. App. A-16-18. The method entails determining the monetary value that users of a natural resource place on its use and multiplying that

value by the number of users of the resource to determine the economic value of the resource. *Ibid.* The administrative record contains numerous economic studies supporting use of the method as a valid tool to attach a monetary value to a natural resource. *Ibid.* The record also contains the expert opinion of an environmental science and engineering professor at UCLA who has published widely in the field of beach valuation, confirming that the Commission used an appropriate figure for the recreational value of the Monterey beach. Pet. App. A-42-43.

The Commission's staff report, provided to petitioner before the Commission's permit hearing, contains a full description of the economic recreational value method and its application to the facts in this case. Pet. App. A-19; AR 4:736-740. The staff report also discusses other possible methods for calculation of a mitigation fee to compensate for loss of the public beach. *Ibid.* Although petitioner's Board of Directors and its legal counsel had an opportunity to review the staff report at length before the permit hearing, at the hearing petitioner did not challenge use of the economic recreational value method, nor did petitioner challenge any of the facts cited in the staff report as the basis for calculation of the $5.3 million fee. AR 11:1817. Instead, petitioner argued that any in-lieu fee for purchase of other recreational property would violate the nexus and rough proportionality requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)

and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). AR 11:1979-1980.

2. Following the Commission's decision to approve the seawall permit with the $5.3 million mitigation fee (reduced to a present value of $2.1 million), petitioner filed a petition for a writ of administrative mandamus in the Monterey County Superior Court. Pet. App. A-24. Among other claims in the mandate action, petitioner disputed the method used to calculate the fee and urged that the fee violates the nexus and rough proportionality requirements of *Nollan* and *Dolan*. *Ibid.* The superior court found that petitioner failed to exhaust its administrative remedies on several arguments raised in the mandate action, including the challenge to the method used to calculate the mitigation fee. Pet. App. B-9. The superior court considered petitioner's nexus and rough proportionality arguments, and concluded that the administrative record supports the Commission's determination that the fee imposed has a nexus to and is roughly proportional to the impact of the seawall. *Id.* at B-10, 11, 12. After entry of judgment in the Commission's favor by the superior court, petitioner filed a timely appeal in the California Court of Appeal. *Id.* at A-12.

3. The Court of Appeal affirmed the superior court judgment. Pet. App. at A-13. The Court of Appeal considered petitioner's argument that the fee is not roughly proportional to the impact of the seawall, and "looked behind the arithmetic" to "evaluate how the Commission analyzed the loss and measured

it." Pet. App. A-38. The court concluded that in order to determine whether the fee is roughly proportional to the impact of the seawall it had to evaluate both the nature of the impact of the seawall and the way its dollar value was measured. *Ibid.* Based on its detailed review of the record, the Court of Appeal concluded that "although the Commission was not required to make a precise mathematical calculation, show an exacting correspondence between fee and loss of recreational value, or demonstrate that the fee was directly proportional to the loss, that is what it did." Pet. App. A-43-44.

4. Petitioner sought review of the Court of Appeal's decision in the California Supreme Court. The California Supreme Court denied review. Pet. App. C-1.

ARGUMENT

Petitioner asserts that there is widespread confusion regarding application of *Dolan's* rough proportionality standard. Pet. App. A-10. The petition does not support this assertion and instead relies only on the unique facts of this case as a basis for review. The narrow and fact-bound question of whether the lower courts properly applied *Dolan* in this particular case is not an important federal question and does not warrant this Court's review.

Even assuming petitioner had presented an important question for review regarding the rough proportionality standard, this case is a poor vehicle

for review. As the trial court determined, and as noted in the Court of Appeal's opinion, petitioner did not challenge the method used to calculate the mitigation fee or dispute any of the facts on which the Commission relied to calculate the fee before the Commission made its permit decision. The record therefore lacks evidentiary support for the arguments petitioner now raises that the fee is not roughly proportional to the public impact of the seawall. This case is also a poor vehicle for review because the question presented by petitioner is based on misstatements of the facts of the case. The petition should be denied.

I. The Petition Does Not Present An Important Federal Question.

The Fifth Amendment of the United States Constitution prohibits government from taking private property for public use without just compensation. This Court's extensive takings jurisprudence includes the decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in which the Court held that to avoid a Fifth Amendment taking claim, a land dedication requirement in a development permit must be "roughly proportional" to the impact of the development on public interests.

In adopting the rough proportionality standard, the Court reviewed state court decisions involving land dedication requirements. The Court rejected as "too lax" rules adopted in some states that required only a generalized statement of connection between

the proposed development and the land dedication. *Dolan, supra*, 512 U.S. at p. 389. The Court also rejected rules adopted in other states that required an "exacting correspondence" between the proposed dedication and the need created by the development. *Id.* at p. 390.

The Court ultimately adopted an intermediate approach favored by most states requiring "rough proportionality" between a land dedication requirement and the public impact of development. The Court stated that "no precise mathematical calculation is required" and that a government agency imposing a land dedication requirement as a condition of development "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[1] *Dolan, supra*, 512 U.S. at p. 390-91.

Although petitioner is seeking review to "resolve confusion regarding how to apply the rough proportionality standard," the petition does not show that confusion warranting review actually exists. The one

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[1] Because *Dolan* concerned a land exaction, it is questionable whether the rough proportionality requirement applies as a matter of federal constitutional law to the mitigation fee at issue in this case. If *Dolan* is limited to land exactions, then the Court of Appeal's rough proportionality analysis raises, at most, a question of state law: how a mitigation fee condition should be reviewed under California state law, including the California Constitution.

case the petition discusses, *B.A.M. Development, L.L.C. v. Salt Lake County*, 196 P.3d 601, 2008 Lexis 158 (Utah, Oct. 24, 2008), characterizes the legal concept addressed in the case, whether a land dedication requirement for a residential development permit meets the rough proportionality standard, as "easily defined." *Id.* at p. 602. The decision advocates use of the term "rough equivalence" rather than "rough proportionality," but does not otherwise deviate from application of this Court's reasoning in *Dolan*; nor does the decision suggest widespread confusion regarding application of the rough proportionality requirement.

The only other support petitioner offers for confusion in application of the rough proportionality standard is a series of citations to statements by legal commentators. None are on point. One characterizes this Court's takings jurisprudence in general as "downright incoherent." Pet. App. A-10. Two others, published immediately after the *Dolan* decision, say that the meaning of the decision will have to be "fleshed out in future decisions." *Id.* at A-11 and A-18. Another is cited for the unremarkable proposition that application of constitutional tests, such as the rough proportionality requirement, can be difficult in the real world. *Id.* at A-11. None of these comments support that there is sufficient confusion about application of the rough proportionality standard to require this Court's review.

The petition's failure to raise an important federal question is highlighted by the question presented for review, which does not ask the Court to refine the rule announced in *Dolan* or suggest any particular refinement of the rule. Instead, the question presented is a request that the Court grant review to determine whether *Dolan* was properly applied to the unique facts in this case. This exceedingly fact-specific question is not one that this Court need answer.

II. This Case Is A Poor Vehicle For Review Of The Rough Proportionality Standard.

Even assuming that the petition did present an important federal question regarding application of the rough proportionality standard, this case is a poor vehicle for review. Petitioner's sole argument against the mitigation fee at the administrative level was that any mitigation fee imposed for purchase of other property, no matter the amount or method for calculation of the fee, would violate the nexus and rough proportionality requirements of *Nollan* and *Dolan*. AR 11:979-1980. Petitioner has abandoned this untenable theory (most likely because *Dolan* explicitly acknowledges that a requirement for purchase of replacement property meets constitutional standards) and now directs its arguments to the particular method used to calculate the mitigation fee. However, the record does not contain any support for petitioner's post-hearing arguments criticizing the method used for calculation of the fee. As an example,

petitioner criticizes the Commission's reference to recreational values of Southern California beaches to determine the recreational value of the Monterey beach that will be lost as a result of the seawall. Pet. App. A-13-14. But petitioner did not provide any evidence at the Commission's hearing indicating that the recreational value of other California beaches is irrelevant in determining the recreational value of the Monterey beach. Similarly, petitioner did not offer any evidence at the permit hearing disputing the Commission's expert opinion that the dollar amount used by the Commission for the recreational value of the Monterey beach was a reasonable one – an opinion that took into account the differences between beaches in different areas of California and the specific characteristics of the Monterey beach at issue. Pet. App. A-42-43. As detailed in the Court of Appeal's opinion, there is extensive record evidence to support that the fee the Commission imposed is roughly proportional to the public impact of the seawall, and there is no record evidence to contravene that conclusion. *Id.* at A-37-44.

This case is also a poor vehicle for review because the question presented is based on a series of misstatements of the facts in this case. First, there is nothing in the record to support the assertion in the question presented that the fee imposed "grossly exceeds" the market value of one acre of beach property in the vicinity of the seawall. In its final decision the Commission noted the variability of beach front land values in the Monterey area, ranging from

$7 million per acre for beach front property in Aptos to $250,000 per acre for beach front saltwater marsh property near Moss Landing. AR 11:2268. The Commission's only statement regarding the market value of beach property near the seawall project was that an acre of such property would cost much more than $1 million. AR 11:2274. Petitioner is therefore incorrect in asking this Court to assume that the fee imposed – $5.3 million reduced to a present value of $2.1 million – grossly exceeds the market value of beach property in the vicinity of the seawall.

Second, petitioner's question states that the Commission determined the amount of the fee by a method expressly adopted to generate an arbitrarily predetermined amount of revenue. As set forth in the opinion below, the method the Commission used to calculate the fee is described at length in the prehearing staff report, including the amount of the fee. Pet. App. A-54-58. There is no record evidence to support petitioner's contention that the method used to calculate the fee was expressly adopted to generate an "arbitrarily predetermined" amount of revenue.

Finally, the question presented incorrectly states that the fee will be used to "finance undetermined recreational opportunities to serve an undetermined population at an undetermined place and time." In fact, the Commission's permit decision states that the fee "is to purchase beach front/dune property for public recreational use in the southern Monterey Bay area . . . within ten years of the fee being deposited into a Monterey Peninsula Regional Parks District

account." Pet. App. A-15; AR 13:2241. Characterizing this specific permit condition as allowing use of the mitigation fee for "undetermined recreational opportunities" at an "undetermined place and time" is a misstatement of the facts in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: January 12, 2009

Respectfully submitted,

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No. 08-753

Supreme Court, U.S.
FILED
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In the

Supreme Court of the United States

OCEAN HARBOR HOUSE
HOMEOWNERS ASSOCIATION,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Sixth Appellate District

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner Ocean Harbor House Homeowners Association (OHH) respectfully files this reply to the opposition to Petition for Writ of Certiorari (Opp.) filed by Respondent California Coastal Commission (CCC).

INTRODUCTION

Justice Holmes wrote that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 415 (1922). In this case, Petitioner OHH asks this Court to draw a figurative line—a line that will help courts identify exactions on new development that go too far. The facts and circumstances of this case clearly demonstrate a need for this Court to provide guidance for applying the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

I

THE PETITION RAISES AN IMPORTANT QUESTION ABOUT A MUCH APPLIED FIFTH AMENDMENT REGULATORY TAKINGS TEST

The Utah Supreme Court recently complained that "by using the phrase 'rough proportionality,' [this] Court has engendered vast confusion about just what the municipalities and courts are expected to evaluate when extracting action or value from a land owner trying to improve real property." *B.A.M. Development, L.L.C. v. Salt Lake County*, 196 P.3d 601, 603 (UT 2008). In *Dolan*, this Court explained the meaning of the nexus standard of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and set out a standard by which to determine if the nexus requirement is satisfied. *Dolan v. City of Tigard*,

512 U.S. at 386. The instant case seeks guidance in applying *Dolan*'s rough proportionality standard; Petitioner seeks a standard that can be applied uniformly to the myriad factual circumstances involved in constitutional challenges to development exactions.

The CCC is wrong when it claims that OHH does not raise an important federal question. The *Nollan* and *Dolan* standards arise in such common and varying circumstances that these exactions tests surely are the most frequently encountered of the four takings tests endorsed by this Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005). The CCC cannot deny that *Dolan*'s rough proportionality standard is applied whenever a government entity imposes conditions intended to mitigate the impact of new development. Exactions are routinely imposed for impacts on public transportation systems, schools, parks, hospitals, senior care facilities, day care facilities, and airports. Several cities in northern California recently attempted to impose fees on new development to finance the expansion of local public cemeteries. A northern California county required an aviation easement as a condition of every building permit, even if the permit application was to build a pool or a garage. The list is endless. And exactions are increasingly imposed on the occasion of development for social welfare purposes, such as to create affordable housing and protect endangered species. *See* Brief Amicus Curiae of California Building Industry Association and Home Builders Association of Northern California in Support of the Petition for Writ of Certiorari.

The CCC claims that, if *Dolan*'s application is limited to exactions requiring a dedication of land, this

case only raises a question of state law. Opp., at 6 n.1. But this case does not ask the court to consider whether *Dolan* applies to exactions in the form of fees, and that issue was neither litigated nor decided below. The fact is the California Supreme Court has held that the exactions standards of *Nollan* and *Dolan* apply to ad hoc monetary exactions. *See Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996); *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 102-03 (Cal. 2002). The question argued to and decided by the courts below was whether the *Dolan* standard was met. *See* decision of the court of appeals at Appendix to Petition (App.) A-32 ("Both *Nollan* and *Dolan* involved permit conditions that required the dedication of land or an interest in land. However, the *Nollan-Dolan* test is not limited to such conditions."); *also see* the trial court decision at B-11-13 ("The 'rough proportionality' test is met in this instance." App. B-13.).

The question before this Court is whether the sort of analysis used to find rough proportionality in this case meets the requirements of *Dolan*. An answer to this question will have far-reaching consequences.

II

THE CIRCUMSTANCES OF THIS CASE CLEARLY DEMONSTRATE THE NEED FOR A FRAMEWORK TO ENSURE THAT EACH ELEMENT OF *DOLAN*'S ROUGH PROPORTIONALITY TEST IS MET

Various acts of the CCC, acts endorsed by the court of appeal, set a dangerous precedent: attenuated impacts and data are sufficient to justify a finding of rough proportionality. The direct impact of OHH's

seawall is the loss of one acre of public beach. The CCC staff recommended use of the real estate valuation method to calculate the required mitigation because it is "most closely tied to the specific land values in the vicinity of the project." Administrative Record (AR) 4:742. The staff's research found that the fair market value of one acre of beach was $1 million. AR 4:735-36. This fee would have met *Dolan*'s requirement that mitigation be "related in nature and extent" to the impact of the development. See *Dolan*, 512 U.S. at 391. But, the Commission, with the express intent of increasing the amount of the monetary exaction, ignored this part of the *Dolan* test.

The CCC ultimately decided to use the economic recreational value method to increase the fee to more than $5 million. (One Commissioner complained that $1 million was "far below what I think is going to be an appropriate amount." AR 11:2005. Believing that $5 million will be of more benefit than $1 million, he moved to increase the fee. AR 11:2022.) The economic recreational value method required that the description of the seawall's impact change from the loss of one acre of public beach to a more attenuated impact—the projected loss of recreational opportunities suffered by the public. And the theoretical bases for calculating this loss were far more amorphous than the traditional means of valuing real estate.

Furthermore, there is no assurance that the mitigation fee will mitigate the impact of the seawall. Because no beachfront property was available for purchase in the Monterey Bay area (AR 4:741-42), the money paid by OHH will be used to acquire new public recreational land in the vicinity of the project (AR 12:2078, 14:2480) and, if not spent within 10

years, "would be donated to one or more of the State Parks located along southern Monterey Bay" or may be given to any "organization acceptable to the Executive Director." AR 14:2480. ("[F]uture acquisition [of beach property] cannot be guaranteed." AR 14:2514.)

As noted in OHH's petition, the test utilized by the Utah Supreme Court in *B.A.M. Development* provides a useful framework for analyzing the rough proportionality standard of *Dolan*. Petition for Writ of Certiorari at 15-16. The test includes factors to ensure that an exaction is related in both nature and extent to the impact of the proposed development. *Dolan*, 512 U.S. at 391. The CCC states, and OHH agrees, that the test outlined and applied in *B.A.M. Development* does not diverge from the dictates of *Dolan*. *See* Opp. at 7. But, when the facts of the instant case are analyzed using the *B.A.M. Development* framework, the rough proportionality standard is not met. *See* Petition at 16-17. This demonstrates what happens when the lower courts do not believe that *Dolan* really means what it says: "[T]he dedication must be related both in *nature* and *extent* to the impact of the proposed development." *Dolan*, 512 U.S. at 391 (emphasis added). Neither of those elements were discussed in the lower court's opinion.

This Court's endorsement of the test applied in *B.A.M. Development*, or adoption of a different test, will ensure that the *Dolan* standard serves as a bulwark against government regulation that "goes too far."

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: January, 2009.

Respectfully submitted,

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Supreme Court, U.S.
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No. 08-753

In the
Supreme Court of the United States

OCEAN HARBOR HOUSE HOMEOWNERS ASSOCIATION,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Sixth Appellate District

BRIEF AMICUS CURIAE OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION AND HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE

The California Building Industry Association (CBIA) and Home Builders Association Of Northern California (HBANC), respectfully submit this brief *amicus curiae* in support of petitioner Ocean Harbor House Homeowners Association and in support of granting the petition for writ of certiorari, pursuant to Supreme Court Rule 37, to review the underlying decision of the state court of appeal. Written consent to the filing of this amicus brief has been granted by counsel for all parties.[1] Copies of such written consents have been lodged with the Clerk of the Court. CBIA and HBANC represent thousands of members throughout California involved in all facets of homebuilding and the provision of housing of all types. These *amici*, their members, and those seeking to buy, rent, or otherwise obtain shelter in California are seriously affected and adversely impacted by administrative actions and judicial decisions that fail to respect the constitutional constraints on development fees and exactions enunciated by this Court.

CBIA is a statewide nonprofit association with over 5,000 members active in all aspects of the housing

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief and acknowledged timely notice of intent to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

development and home-building industry throughout California. HBANC is a non-profit association with more than 800 members in Northern California. These associations, through their members and associates, represent hundreds of thousands of people including architects, engineers, homebuilders, contractors, suppliers, building trades, and allied professionals committed to meeting California's housing needs. The members of these associations develop and provide virtually every type of contemporary housing: single family, multi-family, for-sale, and rental. They are dedicated to reducing the barriers to achieving the American dream of home ownership and broadening the opportunities for all people to obtain housing throughout California.

Development exactions like the $5.3 million "mitigation fee" approved by the opinion below have huge impacts on the affordability and feasibility of housing throughout California, not just in the increasingly exclusive coastal domain under the authority of the respondent Commission. Such development fees and other exactions now commonly exceed $100,000 per single family home in many California jurisdictions, and operate to effectively exclude large segments of the public from obtaining affordable housing in many areas, as described below. The novel $5.3 million "recreational opportunity loss mitigation fee" invented by respondent Commission and approved by the state court below presents one of the more recent and extreme illustrations of such development exactions.

Amici and their members are directly affected by the increasingly pervasive and frequently disproportionate exactions imposed against of all types

of residential development by various agencies of government. *Amici* are also directly impacted by judicial decisions, such as the state court decision in this case, which undermine or confuse the constitutional principles limiting such exactions, as enunciated by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and more recently confirmed in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 548 (2005).

Dolan explained that a government agency exacting property as a condition of approval for development must demonstrate that the required dedication "is related both in nature and extent to the impact of the proposed development" and that the second part of this constitutional test requires "rough proportionality" between the exaction and the "impacts" of the development. The Court further explained that "general agreement exists" among the state courts surveyed that the exaction must have "some reasonable relationship to the needs created by the [development]."(512 U.S. at 391.) Therefore, the amount of the exaction must be shown to be roughly proportional to "the needs created by the development."

The state court opinion below acknowledged it was the respondent's burden to demonstrate that its fee met the constitutional rough proportionality test. (*Ocean Harbor House HOA v. California Coastal Commission*, 163 Cal. App. 4th 215, 234-38 (2008).) Thus, the respondent should have been required to demonstrate the costs of meeting "he needs created by"the approval of the petitioner's seawall, as this Court explained in *Dolan*. Instead the state court approved the respondent' fee on the basis of the purported "value" of cumulative individual recreational opportunities ostensibly impaired or "lost" as a result

of the seawall. This opinion thus raises, once again, the important question of how the requisite "rough proportionality" is to be demonstrated.

By changing the denominator of the "proportionality" calculation from the cost of "needs created by the development" to a more nebulous notion based on a subjective assessment of "lost recreational use opportunities", the state court allowed the respondent to add its own gloss on the *Dolan* mandates. The state court ruling thus portends even more significant erosion of this Court's efforts to maintain a constitutionally-based revetment against excessive or otherwise disproportionate exactions.

Indeed, other local governments in California have already cited this opinion as authority for new types of exactions, as described below. Such new exactions make only the flimsiest pretenses of "rough proportionality" or even disclaim any attempt to demonstrate such proportionality between their demands and the costs of public burdens fairly attributable to new development.

Accordingly, these associations respectfully appear as *amici curiae* to support the petition and urge the Court to grant the petition for certiorari to review the significant issues posed by this case.

SUMMARY OF ARGUMENT

"Mitigation fees," such as those imposed by the respondent Coastal Commission in this case, and other increasingly-pervasive exactions demanded as conditions of approving land use changes and development permits now constitute a very large portion of the cost of providing new homes in California, and elsewhere. Such exactions, however, are necessarily subject to constitutional constraints, including the fundamental requirement that such exactions be shown to be reasonably related to adverse impacts on the public fairly attributable to the proposed development, both in nature and in extent. Respect for and enforcement of such constraints on exactions by state courts is not only essential for constitutional due process, but also for sound public policy and housing and economic reasons.

In *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994), the Court held that exactions imposed as conditions of development approval must be shown to be "roughly proportional" to the projected impacts of the proposed development (*Id.* at 388.). The Court expanded on that by noting the general agreement that the proportionality relationship must be shown between the exaction and "needs created by the development" (*Id.* at 391.).

Here, however, the state court opinion approved an exaction that was purportedly justified by a claimed showing of proportionality on a basis differing from the requirements addressed in *Dolan*. Instead, the court approved the calculation of an ad hoc "mitigation fee" based on the purported "value" of individual and private "recreational opportunities" that would ostensibly be "lost" as a result of the Commission's

approval of a seawall and the anticipated eventual erosion of an acre of beachfront, rather than any new burdens on public facilities, services, or the Commission's resources. The state court opinion makes clear that respondent Commission consciously abandoned any such attempt to justify the exaction based on the estimated costs of providing an equivalent amount of beach ($1 million) or sand ($1.2 million), or based on the costs of meeting "needs created by the development." Instead, the $5.3 million exaction was purportedly justified only by the novel claim that the fee represented the value of lost "recreational opportunities." (*Ocean Harbor House HOA v. California Coastal Commission*, 163 Cal.App.4th 215, 234-38 (2008).)

Such "lost opportunities," however, do not constitute the appropriate measure of impact or burden on the public for the "rough proportionality" calculus required under *Dolan*. (See e.g., *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 883 (1996): "The [government] may not constitutionally measure the magnitude of its loss, or of the recreational exaction, by the value of facilities it had no right to appropriate without payment.") Since the state court opinion used the wrong basis—or at least a different basis than identified in *Dolan*—to measure or demonstrate the proportionality of the respondent's exaction, the decision invites this Court's review. This petition provides an opportunity for the Court to make it clear *how* an agency may try to demonstrate proportionality, i.e., the agency's exaction should be "roughly proportional" to what types of public burdens or impacts?

By approving the respondent's exaction based merely on speculative notions of the values of amorphous foregone opportunities for individuals to make recreational use of petitioner's beachfront property in anticipation of its eventual erosion, the state court opinion erodes one of the key limitations on exactions and opens the proverbial floodgates for the fabrication of exactions which go far beyond the "outer limits" of constitutional proportionality to public burdens.

The Court should therefore grant this petition and further clarify the relevant basis for demonstrating "rough proportionality," and more fully delineate those limits initially described in *Dolan*.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

THE STATE COURT OPINION CREATES GREAT CONFUSION AS TO HOW THE *DOLAN V CITY OF TIGARD* "ROUGH PROPORTIONALITY" LIMITATION ON EXACTIONS SHOULD BE MEASURED AND DEMONSTRATED

New development may reasonably be required to "pay its fair share" of government's cost of providing additional public facilities or services the need for which may be fairly attributed to such new development. However, it is also true that government may not constitutionally exact more than a "roughly proportional" fair share of such costs or public burdens as a condition of approving new development. The Constitution bars the government from "forcing some people alone to bear public burdens which, in all

fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States*, 364 U.S. 40, 49 (1960); quoted in *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

In *Dolan*, the Court held that such constitutional principles require that exactions imposed as conditions of development approval must be "roughly proportional" to the projected impacts of the proposed development. (*Id.* at 388.)

While *Dolan* emphasized that "there are outer limits" as to how far governments might go in demanding exactions to advance even admittedly legitimate and laudable goals in meeting public needs (*Id.* at 396), the Court has not—yet—further delineated those constitutional boundaries.

State courts have thus far been hesitant to draw such "outer limits" themselves in the absence of this Court's further guidance and clarification.

Unsurprisingly, revenue-strapped local governments and regulatory bureaucracies continue to push against those "outer limits" and to demand more and more exotic, and extravagantly costly, development exactions, as illustrated in this case.

Moreover, governments have been increasingly unwilling to acknowledge their obligation to demonstrate evidentiary justifications for such development exactions and fees. For example, at least one city has argued to an appellate court that its municipal water connection fees could be justified "by throwing darts at a dartboard." (*Palermo at Lakeland LLC v. City of Bonney Lake*, 193 P.3d 168, 177 (Wn. App. 2008).)

Such candor as to local governments' perceptions of the prevailing laxity in state court review of exactions may be unusual and perhaps even refreshing. It also demonstrates the profound level of disregard, if not outright defiance, frequently accorded this Court's holding in *Dolan*. For the past decade, many local governments have unilaterally limited, circumvented, or disregarded *Dolan*. Many state courts have gone along. Amici and their members frequently encounter such cavalier approaches to satisfying the constitutional prerequisites to valid fees and exactions. The current case is a particularly vivid example and invites this Court's review and clarification of the constitutional standard of rough proportionality.

The state court in this case approved a novel $5.3 million "mitigation fee" created by the respondent Commission as one of many conditions to the Commission permitting installation of a 200 yard long seawall to protect the petitioner's existing homes from wave erosion and eventual collapse. *Dolan* noted that state courts generally agreed that exactions must be proportional to the "needs created by development." The Court also posited a hypothetical situation similar to this seawall's "encroachment" on the publicly-accessible beach, and suggested that a "reasonable" exaction in such a situation might be "to require petitioner to provide some alternative . . . space for the public either on her property or elsewhere." (*Id.* at 394.) The state court holding does not fit into any of the analyses used in *Dolan*.

By holding that constitutional nexus and proportionality requirements had been met by the respondent Commission's exaction of its mitigation fee,

the opinion allowed exactions to go far beyond the *Dolan* "outer limits", while at the same time asserting that the fee justification had exceeded this Court's requirements.

The Commission did not purport to justify the amount of its mitigation fee by the costs of replacing beach or sand, or otherwise actually "mitigating" the anticipated erosion of an acre of beachfront land. Although the Commission's staff presented evidence of appropriate mitigation fees based on such approaches (*Id.* at 394.), the Commission rejected these approaches. Instead, it exacted the $5.3 million fee based on the estimated "value" of ostensibly "lost" recreational opportunities based on projected beach usage hundreds of miles away from the site.

Although *Dolan* explained that "no precise mathematical calculation is required" for government to demonstrate such proportionality, the Court did make it clear that at least an appropriate numerator and denominator must be used in setting up even a "rough" proportionality analysis.

The amount of an exaction must be shown to be proportional to public burdens or impacts caused by, or occasioned by the proposed development, or "needs created by" development. (*Dolan*, *supra*, 512 U.S. at 390-91.) The cases the Court cited in *Dolan* involved burdens or impacts on public facilities and services that were allegedly caused by the activity for which approval was being specifically sought. *Dolan's* analysis of "rough proportionality" addressed the applicant's impact on government's cost of obtaining and providing property for the desired greenway/floodway. The Court did not indicate any basis for attempting to measure the proportionality of

the exaction in relation to the value of the possible loss of "opportunities" to provide bicycling pathways or floodway drainage.

Every land use decision involves some foregoing of "opportunities" to use that property for inconsistent alternative purposes. Those opportunities typically belong to the owner or occupant of the property, rather than to the government agency making the decision to permit the use. If the Constitution is to be deemed to permit government to charge a price for exercising its discretion to make land use decisions, and to set that price on the basis of speculative values of "lost opportunities" for individual members of the public to enjoy alternative uses of the property, rather than on the actual costs of meeting burdens on public facilities and services, such broad and near-unrestricted authority should be made clear by this Court. Otherwise, the state court's opinion stands for further undermining and confusing the standards described in *Dolan*.

II

THE STATE COURT'S OPINION IS ALREADY BEING USED BY OTHER GOVERNMENTAL AGENCIES IN CALIFORNIA TO TRY TO JUSTIFY OTHER NOVEL EXACTIONS OF PROPERTY

Amici, their members, and legal counsel representing them have already been confronted with other local governments in California invoking the state court opinion in this case as a form of justification for new types of development exactions.

For example, the City of Stockton, California, recently adopted a broadly-applicable "agricultural land mitigation policy" whereby the City now demands a new form of exaction as a standard condition of the City approving the development of any land currently designated for "agricultural" use to residential use. Such an applicant now must either dedicate to the City (or to its designated trustee) an amount of privately-owned land encumbered by a permanent conservation easement equivalent to the development area, or to pay fees "in lieu" of such dedication. There was no evidence showing that new residential development in any way causes or "occasions" any new needs for municipally-controlled privately-owned agricultural easements (or "city farms" as they are sometimes called.) An association of homebuilders has challenged the City's new exaction policy, and the City has defended it at trial by arguing, on the basis of *Ocean Harbor House HOA*, that the City did not need to show a nexus, and if such a showing of proportionality were required, the exaction could be justified on the basis of "lost opportunities" for individuals to continue to farm in the vicinity of the City. (*Building Industry Association of the Delta v. City of Stockton*, San Joaquin County Superior Court, Case No. CV032651, City's Trial Brief dated 10/02/2008, pp. 28-29. Court trial on Nov. 3, 2008, now under submission.)

Amici and their members report similar arguments in support of other exactions, such as "inclusionary housing" set-aside requirements and fees on housing as purported "indirect sources" of air emissions, are now being based, at least in part, on the state court's opinion in this case and its tolerance of the respondent's novel claim of "proportionality"

between fees and purported "impacts" on undefined opportunity losses, rather than measurable cost burdens on public facilities and services.

III

BECAUSE DEVELOPMENT FEES AND EXACTIONS NOW CONSTITUTE SUCH A LARGE FACTOR IN HOUSING AFFORDABILITY, IT IS ESSENTIAL THAT THE CONSTITUTIONAL PRINCIPLES LIMITING SUCH EXACTIONS BE CLARIFIED AND RESPECTED BY STATE COURTS

In many jurisdictions, fees and exactions cumulatively drive the cost of housing beyond levels deemed "affordable" by the much of the shelter-seeking public. Excessive or disproportionate fees and exactions thus operate much like now-discredited "exclusionary zoning" rules, imposing significant barriers to home ownership.

This phenomenon has been documented in a study by the State of California's Department of Housing & Community Development, entitled PAY TO PLAY: Residential DEVELOPMENT FEES IN CALIFORNIA CITIES AND COUNTIES (HCD, Sacramento, 1999) ("Pay to Play"):

"**California development fees are extremely high.** Single-family home builders in California in 1999 paid an average of $24,325 per unit in residential development fees, based on the results of our sample of 89 cities and counties." (*Id.* at p. 85.)

"Fees range widely, from a low of $11,176 per single-family subdivision home to a high of $59,703." (*Id.* at p. 103.) . . .

> "Measured as a proportion of average new single-family home prices, local development fees range from a low of 2% to a high of 20%. . . . Indeed, the more expensive the housing market, the smaller the contribution of fees to housing costs. Conversely, the more affordable the housing market—the greater the level of housing construction activity—the greater the share of housing costs attributable to development fees. This puts affordable housing advocates, including the authors of this Report, in the difficult position of having to argue for fee reductions in the very same communities who are already disproportionately shouldering the State's affordable housing burden. . . ." (PAY TO PLAY, p. 104.)

Other studies have demonstrated that the impact of such development fees on housing prices may be even more burdensome than revealed in the PAY TO PLAY study. For example, a 2002 study demonstrated that the average development fee load in the San Francisco Bay Area has risen to approximately $65,000 per house and identified at least one project in the City of Livermore where total fees exceed $118,000 per home. (Phil Serna, "*Milestone Hit as Livermore Fees and Exactions Top $100,000 per Home*," HBA NEWS (Homebuilders' Association of Northern California, July 2002).) More recently, the City of Livermore has pointed to the nearby City of Dublin as beating it in the development fee derby, claiming Dublin's fees now

average more than $130,000 per home. Other communities around Sacramento, California recently vied for having the highest local fees, in excess of $120,000 per home.

Likewise, California's Department of Housing & Community Development noted:

> "Their widespread use notwithstanding, residential development fees—which constitute the bulk of development fee revenues—are controversial on at least two counts. The first concerns the high degree of variation between jurisdictions regarding which fees are charged and their amounts. . . . A second issue of concern regarding local development fees concerns their contribution to the high cost of housing. Theory suggests, and some empirical studies demonstrate, that fees contribute directly to the higher housing prices, especially during periods of strong housing demand." (PAY TO PLAY, pp. 1-2.)

The State government, housing advocates, and providers of housing—including *amici* and their members—recognize the serious and potentially adverse effects of excessive or unreasonable development fees on the affordability of housing in California, and throughout the nation.

"Impact fees are subject to criticisms that, among other things, they ultimately drive up the cost of housing and unfairly burden newcomers to the area with providing public facilities for the entire community. F. Powell, *Challenging Authority for Municipal Subdivision Exactions* (1990) 39 DEPAUL

L. REV. 635, 636." (*Thompson v. Village of Newark* 768 N.E. 2d 856, 859 (Ill. App. 2002).)

For all these reasons, it is critical, not only CBIA, HBANC, and their members, but to the economic vitality of housing and development in California and throughout the United States that there be clearly enunciated, well-understood, and widely-respected guidance from this Court as to how the "rough proportionality" of fees and other exactions must be measured for purposes of demonstrating constitutional validity.

CONCLUSION

The CBIA and HBANC, as *amici curiae*, therefore respectfully submit that the petition for writ of certiorari be granted.

DATED: January, 2009.

Respectfully submitted,

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